84-811

Office Supreme Court, U.S.
FILED
NOV 16 1984
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

H.G. GIBSON, J. SCOTT KENNEDY,
and GARY N. BANKS, *Petitioners,*

v.

THE BOEING COMPANY, a corporation;
THE NATIONAL TRANSPORTATION SAFETY BOARD
and JAMES KING, Chairman;
THE FEDERAL AVIATION ADMINISTRATION,
and J. LYNN HELMS, Administrator, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

LANDON GERALD DOWDEY
310 Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 872-1997

THOMAS D. BEATTY
601 East Bridger Avenue
Las Vegas, Nevada 89101
(702) 382-2721

Counsel to petitioners

48 pp

QUESTIONS PRESENTED FOR REVIEW

This is a defamation action brought by three airline pilots against The Boeing Company for statements which blamed a near fatal six mile dive of a Boeing 727 on plaintiffs' unprofessional conduct. The pilots also made claims against the National Transportation Safety Board (NTSB) and Federal Aviation Administration (FAA) for damages under subsections (g)(1) (C) and (D) of the Privacy Act (5 USC §522a).

The questions raised by the summary judgments for Boeing and the government agencies are these:

1. Is the communication of "a written report to the NTSB," where it becomes a public record, protected by an absolute governmental immunity or privilege?

2. Is summary judgment as to the "malice" necessary to overcome a qualified privilege appropriate prior to any discovery being allowed plaintiffs and notwithstanding their pending, unanswered interogatories, document requests, and two affidavits of counsel invoking Fed R. Civ. P. 56(f)?

3. Are plaintiffs' claims under subsections (g)(1)(C) and (D) of the Privacy Act sufficient if they concern a "record" as defined in subsection (a)(4), or must such claims relate also to a "system of records" as defined in subsection (a)(5)? Also, does the failure of defendant agencies to incorporate investigation materials about this accident in the "system of records" they maintain for aircraft accident investigations bar this action?

4. Is the exercise of this Court's certiorari jurisdiction unreasonably burdened by successive summary dispositions which fail to elucidate important legal issues involved or deal adequately with a complicated state of facts which has given rise to a national controversy over air safety?

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	3
Statement of the Case	4
"The Plane That Fell Out of the Sky"--according to the complaint	5
Alleged publications by Boeing agents	7
Privacy Act allegations	8
Discovery sought and suspended	10
Reasons for Granting the Writ	13
Conclusion	38

Table of Authorities

Cases

Albright v. United States	30
Bane v. Spencer	26
Bose Corporation v. Consumers Union	22, 28
Butz v. Economu	14
Bozant v. Bank of N.Y.	37
Chapman v. NASA	35
Clarkson v. IRS	30, 31, 35
Delome v. Union Barge Line Co	15

Page

Dun & Bradstreet v. Greenmoss Builders, Inc. 22
Elder v. Holland 21
Engelmohr v. Bache 20-21
Garter-Bane Co. v. Munsingwear 18
Gersh v. Ambrose 21
Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. 22
Handi Investment Co. v. Mobil Oil Corp 26
Harlow v. Fitzgerald 14
Knox v. Dick 21
Londrigan v. FBI 24
Loudin v. Mohawk Airlines, Inc. . . . 19-20
Maple Island Farm v. Bitterling. . . . 15
Nixon v. Fitzgerald. 14
Parrish v. Board of Commissioners. . . 26
Program Engineering v. Triangle Publications 24
Texas Partners v. Conrock Co. 26
Timberland v. Bank of America. 23
United States v. Johns Manville Corp. 23
Washington v. Cameron. 26

Statutes

Fourteenth Amendment to the Constitution of the United States. 15

Department of Transportation Act of 1966 18

Federal Aviation Act of 1958 19-20

49 USC
§1441 17
§1421 et seq. 17

Privacy Act of 1974, 5 USC §552a (a)(4) 30

Page

(a)(5) 30
(e)(1) 31
(e)(4) 34
(e)(5) 31, 35
(e)(6) 35
(e)(7) 30
(g)(1)(C) 9, 31, 32
(g)(1)(D) 9

Transportation Safety Act of 1974, 49 USC

§1903(a) 15-16, 18
§1903(b) 16
§1903(c) 17
§1905. 18
§1906. 17

Rules of Court

Fed. R. Civ. P.
52(a). 29
56 29
56(e). 23, 24
56(f). 12, 24-25, 27
Form 2(a). 15

Other Authorities

Federal Register, July 4, 1977 34

OMB Guidelines for Implementation of The Privacy Act 40 FR 28948, 40 FR 28964. 35

William L. Reynolds and William R. Richman, "An Evaluation of Limited Publication in the United States Courts of Appeal: The

Page

Price of Reform," 48 U. Chi. L. Rev. 573. 37

Retatement of Torts, 2d (1977)

§598 21

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

H.G. Gibson, J. Scott Kennedy and Gary N. Banks, petitioners

v.

The Boeing Company, The National Transportation Safety Board, James King, The Federal Aviation Administration and J. Lynn Helms, respondents

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, H.G. Gibson, J. Scott Kennedy and Gary N. Banks respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 9, 1984.

Opinions Below

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears in the appendix to this petition (A 1) but is not and will not be reported under that Court's Rule 21(c) and the panel's finding. No opinion was rendered by the District Court for the District of Nevada. Its findings of fact and conclusions of law and grant of summary judgment thereon are set out in the appendix (A 9, A 17, A 18, & A 25)

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered April 9, 1984. A timely petition for rehearing and rehearing en banc was denied July 20, 1984. This Court, upon application filed herein on October 12, 1984 entered an order on October 18, 1984 extending the

time for filing a petition for writ of certiorari in this case to and including November 16, 1984. This Court has jurisdiction under 28 USC §2101(c).

Statutory Provisions Involved

Federal Aviation Act of 1958, Pub. L. 85-726, Title VII, §701, August 23, 1958, 72 Stat. 781, as amended by Pub. L. 87-810, 1, 2, Oct. 15, 1962, 76 Stat. 921, codified to 49 USC 1441 is set out in the appendix (A 81). Transportation Safety Act of 1974, Pub. L. 93-633, Title III, January 3, 1975, 88 Stat. 2166, codified to 49 USC 1901 et seq. is set out in the appendix (A 83). Privacy Act of 1974, Pub. L. 93-579, December 31, 1974, 88 Stat. 1897, as amended by Pub. L. 94-183, December 31, 1975, 89 Stat. 1057, codified to 5 USC 552a is set out in the appendix (A 93).

Statement of the Case

Petitioners, a professional flight deck crew employed by Trans World Airlines, allege in their complaint that on April 4, 1979 they were operating a Boeing 727 near Flint, Michigan. "Unexpectedly, and for reasons unknown to plaintiffs," the aircraft "fell from an altitude of approximately 39,000 feet in a spiral dive to near 5000 feet before plaintiffs were able to regain control and avert a crash which most certainly would have taken the lives of 82 passengers and a flight crew of seven" (A 29).

Controversy has raged around the cause of this near calamity ever since the crew safely landed their crippled aircraft at Detroit over four years ago. As recently as July 14 of last year CBS did an hour long documentary on "The Plane That Fell Out of the Sky."

A jury trial of the issues was prevented by entry of summary judgment for defendants last year in plaintiffs' then two year old lawsuit against Boeing, the NTSB and the FAA. No discovery had been permitted in the case up to that time, so the record for review is limited to the complaint, affidavits, exhibits, and the discovery requests plaintiffs were denied.

"The Plane That Fell Out of the Sky"--according to the complaint*

After reciting the circumstances of the spiral dive as set out above and the commencement of NTSB and FAA investigations, the complaint alleges "defendant NTSB turned over to an interested party, namely defendant Boeing, the conduct of

---

*Although the complaint is not set out in the appendix to this petition, significant paragraphs are quoted in plaintiffs' excerpted interrogatories which are reproduced in the appendix.

most of its investigative and testing functions, knowing full well that said defendant had a strong economic and public relations incentive to shift any blame for the spiral dive away from themselves and onto the pilots of the aircraft." Boeing, the complaint goes on, "conducted its investigations and tests so as to support its claim that safety factors built into the 727 are so extensive that the spiral dive could not possibly have been precipitated by any mechanical or structural, manufacturing or design defect in its aircraft. To this end its investigation attempted to explain away, as causative factors, (1) all noticeable defects, damaged and defective parts discovered after the aircraft landed in Detroit; (2) laboratory tests...and (3) other technical defects and deficiencies too numerous to mention (A 32-33).

"Defendant Boeing then went beyond its assigned task as investigator of facts and scientific tests, and without waiting for all the evidence and tests to be finished, stated as conclusions: (1) The cause of the upset was some unauthorized cockpit procedure engaged in by the flight deck crew; (2) had the crew taken prompt and appropriate action after their aircraft began to roll, they could have regained control easily; and (3) the last second recovery from the spiral dive and prevention of a major air disaster was fortuitous and due to circumstances for which the crew was only minimally responsible" (A 33-34).

Alleged publications by Boeing agents

The complaint alleges that the foregoing assertions by Boeing "(1) were pub-

lished through its many agents, servants and employees, and in a written report to defendant NTSB where it became a part of the public record and widely circulated through official and aircraft industry channels and in the public media; (2) are false and based on theories unsupported by fact and discredited by tests; (3) were published with knowledge of their falsity or with reckless disregard for their truth, or negligently; (4) went beyond the scope of prescribed practice in NTSB and other accident investigations in that the stated conclusions were premature and amounted to a prejudgment before all the evidence was in; and (5) went beyond the purpose of the inquiry in that the conclusions were motivated by an attempt to side-track any meaningful investigation of the airworthiness of the Boeing 727, the most widely used commercial aircraft in

service today" (A 34-35).

Privacy Act allegations

The complaint alleges, paraphrasing the language of subsections (e)(6) and (g)(1)(C) and (D) of the Privacy Act (5 USC §522a), that defendant agencies failed to "maintain records concerning the individuals involved with such accuracy, relevance, timeliness, and completeness as is necessary to assure the fairness of any determination relating to the qualifications, character, rights or opportunities of, or benefits to, the individual that may be made on the basis of such record." In consequence, defendant FAA, "determined and published through official and aircraft industry sources and to the public media, the groundless assertion that plaintiff had intentionally erased the cockpit voice recorder in order to conceal

information about their conduct respecting the spiral dive" (A 43).

Similarly, influenced by their own improperly maintained records, defendant NTSB "determined and published through official and aircraft industry sources and to the public media" Boeing's groundless assertions of crew responsibility for losing control of the aircraft they were piloting (A 45-46).

Discovery sought and suspended

A few months after commencement of this action, plaintiffs served a number of interrogatories and document requests on defendants which inquired, for the most part, about specific allegations of the complaint and answer (A 29-48).

Shortly thereafter, the Court issued an order (A 26-27) suspending Boeing's obligation to respond to plaintiffs' out-

standing interrogatories and document requests until 30 days after disposition of the "motion to dismiss" Boeing planned to file. Plaintiffs had agreed to this suspension upon the written representation of Boeing's counsel that the intended motion "raises legal issues unrelated to the discovery requested of my client" (A 64).

Boeing's proposed "motion to dismiss" became a "motion for summary judgment" when it was filed. Its stated grounds were limited, however, to the defense of "absolute privilege" for its "written report to defendant NTSB" which it attached to its motion together with affidavits showing its transmittal and receipt. Plaintiffs responded, treating the motion as one to strike that claim only (A 66).

To illustrate, without benefit of discovery, some of the disputes which revolved around the "Boeing report," plain-

tiffs filed a then recent article from a professional journal which reviewed, in summary form, the history of the Flight 841 investigation (A 49).

Boeing then filed a reply memorandum, and with it "proposed findings of fact and conclusions of law" which greatly expanded the breadth of its summary judgment motion. Most notably, it proposed that the Court find in its favor "whether the privilege is considered absolute or conditional" (A 15, 67-68).

Faced with this radical expansion of issues, plaintiffs filed an affidavit of counsel under Fed. R. Civ. P. 56(f) explaining in detail why plaintiffs could not respond to defense affidavits without discovery (A 64).

When the summary judgment motion finally came on for hearing some fifteen

months later--the delay being caused entirely by Court-initiated postponements (A 77-78)--plaintiffs' counsel reexecuted and refiled the same Rule 56(f) affidavit three days before argument (A 75).

A few days thereafter, the District Court endorsed the findings of fact, conclusions of law and summary judgment proposals submitted by defendants with no change other than striking out the word "proposed." Defendants' proposals, having been submitted some seventeen months earlier, before either of the Rule 56(f) affidavits were filed, took no notice of them nor of the plaintiffs' outstanding discovery requests (A 9-25).

REASONS FOR GRANTING THE WRIT

1. The failure to apply fundamental distinctions between absolute and quali-

fied immunities[1] to the investigative role of the National Transportation Safety Board is a disservice to that important federal news making agency and the many segments of the public who deal with it constantly.[2]

---

[1]Absolute immunities of officials other than the President of the United States "extend only to acts in performance of particular functions." Nixon v. Fitzgerald __ U.S. __, 73 L. Ed. 349, 363, 367 (1982). "Moreover, in general, our cases have followed a 'functional' approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant." Harlow v. Fitzgerald __ U.S. __, 73 L. Ed. 396, 406 (1982).

Qualified immunity is the norm for executive officials generally, including governors and members of the President's cabinet. Harlow v. Fitzgerald, __ U.S. __, 71 L. Ed. 396, 403 (1982); Butz v. Economu, 438 U.S. 478, 508 (1978).

[2]The Court of Appeals was concerned, however, with pleading diversity of citizenship as a paraphrase of the Fourteenth Amendment ("a citizen of the United States and a resident of the State of Nevada") instead of in the conclusory language of

(footnote 2 continued on page 17)

The NTSB is an anomaly among federal agencies; for its accident investigation function is concerned solely with public advocacy of transportation safety, a matter over which it exercises no adjudicatory or rule making authority.

49 USC §1903(a)(1) authorizes the Board to "investigate or cause to be investigated...and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any...aircraft accident" or other transportation

---

[2](continued)
Fed. R. Civ. P. form 2(a). This concern found its way into the Court's memorandum (A 1-2). "Standing alone, an allegation that a party is a resident of a certain state is not a sufficient allegation of his citizenship in that state" (empahsis added), Delome v. Union Barge Line Company, 444 F.2d 225 at 233 (5th Cir. 1971); but coupled with United States citizenship, it meets the state citizenship test of the Fourteenth Amendment and confers diversity jurisdiction. Maple Island Farm v. Bitterling, 196 F.2d 55 at 57-58 (8th Cir. 1952), a case argued successfully by Warren E. Burger, the present Chief Justice.

accident (A 86). In subsection (a)(2) it is authorized to "report on the facts, conditions and circumstances of each accident...and cause such reports to be made available to the public" (A 87)[3]

---

[3]In subsection (a)(3), NTSB is directed to "issue periodic reports" to other government agencies and interested persons "recommending and advocating meaningful responses to reduce the likelihood of recurrence of transportation accidents similar to those investigated by the Board...." The remaining paragraphs of subsection (a), insofar as they relate to accident investigations, list similar recommending activities and in paragraph (6) the NTSB is authorized to "establish by regulation requirements binding on persons reporting accidents subject to the Board's investigatory jurisdiction under the subsection." The Federal Aviation Act of 1958, as amended (A 81), confers almost identical functions on the NTSB in 49 USC §1441(a).

In aid of these purposes (and some others unrelated to accident investigation), the Board, under 49 USC §1903(b)(1), may delegate its authority to any Board member, administrative law judge, officer or employee. Persons so delegated may hold hearings, administer oaths and require the attendance of witnesses and production of documents by subpoena "as such officer or employee deems advisable" (A 88).

But the NTSB adjudicates no rights and promulgates no rules in connection with the exercise of its accident investigation functions. Its determination of "probable cause" has no legal or administrative consequences and under 49 USC §1441(e) and 1903(c) is not even admissable in evidence in any other proceeding (A 90). NTSB recommendations for improvement in air safety regulations have no authority beyond their persuasiveness to the Secretary of Transportation--the responsibe air safety rule making agency under 49 USC §1421 et seq.--who is entirely free to accept or reject NTSB suggestions. 49 USC §1906 (A 92). Thus NTSB "determinations" are essentially "publications" by an agency having no function beyond reporting the results of what is presumably its own independent investigation.

In furtherance of this purpose, it has

an affirmative duty under 49 USC §1905 to make available to the public, subject to certain limited exceptions, "Copies of any communications, document, investigation, or other report, or information received or sent by the Board, or any member or employee of the Board" (A 91).

Ever since the NTSB was established by the Department of Transportation Act of 1966,[4] it has exercised its recommending function with respect to accident investigations side by side with certain quasi-judicial functions it inherited from the old Civil Aeronautics Board.[5]

Impressed by CAB's "quasi-judicial and

---

[4]Act of October 15, 1966, Pub. L. No. 89-670, 80 Stat. 931.

[5]Thus it reviews on appeal, under 49 USC §1903(a)(9)(A), licensing certificate decisions of the Secretary of Transportation; and, inherited from other sources, under 49 USC §1903(a)(9)(B), it reviews appeals from licensing decisions by the Commandant of the Coast Guard (A 88).

quasi-legislative powers" respecting the economic regulation of air carriers, a New York trial court in 1964 held in Loudin v. Mohawk Airlines, Inc.[6] that a witness at a public hearing on the cause of an aircraft accident before the Civil Aeronautics Board was protected by an absolute privilege. The Court failed to notice, however, that CAB's accident investigation function was no longer related to any air safety rule making authority after the Federal Aviation Action of 1958 transferred that responsibility to the newly

---

[6]44 Misc. 2d 926, 255 NYS 2d 302 (S. Ct., N.Y. County, 1964), modified, 24 AD2d. 447, 260 NYS 2d 809 (S. Ct., Appellate Division, First Department, 1965), on remand, 58 Misc. 1035, 297 NYS 2d 630 (where it is pointed out, 297 NYS 2d at 632, that the claimed defamation was based on sworn testimony of a witness at a public hearing).

formed Federal Aviation Administration.[7]

The absence of a functional analysis in Loudin has caused it to drop out of sight in subsequent decisions. Loudin was described by the Supreme Court of Washington (the highest court of defendant Boeing's home state) as "one isolated case" which, in 1966, it refused to follow in Engelmohr v. Bache.[8] There it was held that a witness before an administrative body appointed by the Securities and Exchange Commission to study rules governing national securities exchanges did not have the benefit of absolute privilege. The Court explained, "We do not want to depart from the established policy in this country."

---

[7]Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, §701, House Report No. 2360, 1958 U.S. Code Cong. & Adm. News, p. 3746-3748.

[8]66 Wash. 2d 103, 401 P.2d 346, 348 (1965), cert. denied 382 U.S. 950.

Engelmohr v. Bache has since been followed in Virginia (1967),[9] Maryland (1981),[10] and most recently in Nevada (1983).[11] Its principle has found its way into the 1977 Restatement of Torts 2d, Comment e to §598:

> Testimony offered before investigating committees, commissions and other bodies properly authorized to conduct investigations is conditionally privileged unless the investigation is a judicial or a legislative proceeding, in which case the testimony is absolutely privileged....

Into which of these categories do NTSB proceedings fit? Mass media coverage of transportation disaster investigations--or near disasters such as here involved--gives daily emphasis to the importance of

---

[9]Elder v. Holland, 208 Va. 15, 155 SE 2d 369 (1967).

[10]Gersh v. Ambrose, ___ Md. ___, 434 A.2d 547 (1981).

[11]Knox v. Dick ___ Nev. ___, 665 P.2d 267, 270 (1983).

an authoritive answer to this now unsettled question.

2. To the extent that the ruling below may be said to rest on the establishment of a qualified immunity or privilege, it fails to meet the special standards of appellate review respecting determinations of "malice" in defamation cases recently announced by this Court in Bose Corp. v. Consumers Union of U.S., Inc. ___ US ___, No. 82-1246, decided April 30, 1984.

Also involved is the applicability of the "malice" standard in a non-media defamation case now pending before the Court in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18, to review the holding of the Supreme Court of Vermont sub nom. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 46 A.2d 414 (1983).

Is the "independent examination of the whole record" mandated by Bose excused by

petitioners' alleged inaction in pressing their discovery demands during "the lengthy time between Boeing's motion for summary judgment and the hearing on the motion" (A 6)?

Traditionally, and in the Ninth Circuit, the effect of filing a motion for summary judgment is to suspend the "general right to discovery," and until such motion is resolved, discovery may be pursued by a party, according to Rule 56(e), only to the extent that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits" (emphasis added).[12] The appropriate way to seek permission for discovery during the

---

[12]Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 602 (9th Cir. 1976); United States v. Johns-Manville Corporation, 237 F. Supp. 893 (E.D. Pa. 1965).

pendency of a summary judgment motion is by filing a Rule 56(f) affidavit, although some courts, including the Ninth Circuit, sometimes allow Rule 56(f) discretion to be invoked by motion.[13] Although a Rule 56(f) affidavit is not a motion (as the Court's memorandum describes it), filing it has the effect of invoking the full range of the court's discovery discretion under Rule 56(e):

> The District Court, by the terms of Rule 56(f), [has] the options of refusing to grant summary judgment, ordering a continuance to permit affidavits to be secured or discovery to be conducted, or entering 'such other order as [is] just'.[14]

Since the chief impediment to a response on the merits according to the affidavit here involved was the stipulation and

---

[13]Program Engineering, Inc., v. Triangle Publications, Inc. 634 F.2d 1188, 1193 (9th Cir. 1980).

[14]Londrigan v. FBI, 670 F.2d 1164, 1175 (D.C. Cir. 1981).

order suspending Boeing's obligation to respond to pending interrogatories and document requests (A 71)--on the precise issues upon which it was seeking summary judgment (A 33-37)--an order permitting "discovery to be conducted" on these issues was plainly the relief plaintiffs sought.[15] A separate motion, seeking this same relief, would not only be redundant; it would encourage a practice specifically disapproved.

When it appears on a Rule 56(f) ap-

---

[15]The affidavit stated (A 71-72) "Plaintiffs are therefore unable at this time, without discovery, to present by affidavit or otherwise facts essential to justify their opposition to defendants' motion[s] for summary judgment" (emphasis added). After outlining specific issues that needed development (A 72-73) it concludes, "plaintiffs respectfully request the court not to try this case on affidavits, deny the pending motions for summary judgment and set the case down for trial on the merits at the earliest opportunity after completion of discovery" (A 74, emphasis added).

plication that answers to interrogatories "might be relevant" to the issues on a pending motion for summary judgment, a stay order making it unnecessary to answer them must be vacated and the applicants "allowed further discovery."[16] "A defendant who has failed to answer relevant and timely interogatories is, as least normally, in no position to obtain summary judgment."[17]

Of course, a different case would be presented if plaintiffs had been dilatory in pursuing discovery. But the record in this case affirmatively establishes plain-

---

[16]Handi Investment Co. v. Mobil Oil Corp.,, 550 F.2d 543, 547 (9th Cir. 1977). See also Washington v. Cameron, 411 F.2d 705, 710, (D.C. Cir. 1969).

[17]Bane v. Spencer, 393 F.2d 108, 109 (1st Cir. 1969) cert. denied 400 U.S. 866. The same is true of document requests. Parrish v. Board of Commissioners, 533 F.2d 942, 948 (5th Cir. 1976) cited with approval in Texas Partners v. Conrock Co., 685 F.2d 1116 at 1119 (9th Cir. 1982).

tiffs' diligence. The long delay in hearing the motions to dismiss or for summary judgment--and ruling on plaintiffs' Rule 56(f) affidavit--was occasioned entirely by month to month sua sponte postponements by the district judge (A 77-78).

In an effort to expedite hearing of these motions, counsel for all parties stipulated that they might be heard by a magistrate. But the Court refused to approve the stipulation (A 77). To suggest that another application to the Court--to obtain discovery during the pendency of summary judgment motions--would receive a more expeditious response than the Rule 56(f) affidavit is a more hopeful speculation than the record in this case warrants.

The interrogatories which plaintiff-appellants served shortly after the commencement of this action and other ma-

terials[17a] provide as high a degree of issue specificity as is possible for a legal standard as subjective as "actual malice," a concept which is, moreover, undergoing rapid modification and change as the Court's current docket testifies.

On such issues, as Bose explains, "the rule of independent review" by appellate

---

[17a] See
(a) the high degree of issue specificity in the interrogatories plaintiffs wanted answered (A 28);
(b) the context of a continuing national controversy over Boeing's disparagment of plaintiffs' professional conduct exemplified in a technically detailed article from a professional journal attached as an exhibit to plaintiffs' opposition to summary judgment (A 44);
(c) the conflict between Boeing affidavits and testimony in other related litigation (A 72-73);
(d) the conflict between the federal agency denial of a "system of records" with a federal register publication describing a "system of records" in which records of this accident were required to be maintained (A 106); and
(e) a deposition in related litigation showing a breakdown in govenment record keeping (A 78).

courts "cannot be delegated to the trier of fact" (Slip Op. at 14). Summary judgment appeals, which are ordinarily a matter of de novo appellate review in any event, certainly cannot dispose of such a sensitive matter by delegation to lower court "discretion." This is doubly improper in this case since the suspicion that attaches to "mechanical adoption of the successful attorney's 'suggested' findings" in a Rule 52(a) appeal is "equally applicable to a Rule 56 appeal," requiring the court to scrutinize such rulings with special care.[18]

3. The Court below held: "The Privacy Act mandates certain requirements for government documents organized in 'systems of records'.... [T]he official files of the incident in this case were not organized

---

[18]Garter Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 980 (9th Cir. 1980).

in this fashion, and so fall outside the plain language of the statute. But at least two other circuits, applying the same "plain language" test, have held otherwise.

The District of Columbia Circuit in Albright v. U.S.[19] held that "no record" in subsection (e)(7)--set out at A 98--is not restricted by its c encement (A 96) describing the kind of agencies to which it was applicable as those that maintain "a system of records," the terms being separately defined by subsections (a)(4) and (a)(5) in the Act (A 93).

In Clarkson v. IRS[20] the Eleventh Circuit reexamined and followed Albright as to subsection (e)(7); but declined, out of concern for statutory objectives, to extend the Albright rationale to subsections

---

[19]631 F.2d 915 (D.C. Cir. 1980).

[20]678 F.2d 1368 (11th Cir. 1982).

(e)(1) and (e)(5), set out at A 96, 97.

(g)(1)(C), A 99, and (e)(6), A 97-98, here involved, have nothing to do with "retrievability" within a "system of records." The somewhat similarly worded subsection (e)(5), for example, is limited to "records...used by the agency in making any determinations about an individual." Its purpose, according to Clarkson is "to minimize, if not eliminate, the risk that an agency will make an adverse determination about an individual" based on faulty data. But when the risk of an adverse determination has become the fact of one, retrieval is no longer an issue and (g)(1)(C) comes into play. (e)(6) is similarly unconcerned with indexing methodology. It is directed to "disseminating any record about an individual to any person." If the defendant agency has disseminated a record of poor quality to the pub-

lic, what difference does it make that the broadcast record is not part of a "system of records"?

Paragraph (C) of subection (g)(1) is by its terms expressly directed at adverse determinations which result from the failure to maintain "any record" with sufficient accuracy, timeliness and completeness. By what logic, therefore, can a cause of action applicable to "any record" be read to extend only to "any record--contained in a system of records"?

The negative response of the system respecting records of this accident is no defense and calls for an explanation. Within three hours after this accident FAA investigators were busy interviewing Captain Gibson in his hotel room (A 51). A few days later, "FAA and NTSB revealed to the press the discovery that the cockpit voice recorder had been erased"--a cir-

cumstance which, despite its sinister implications to an uninformed public, should have little or no significance in a professional investigation. Such recorders "work on a 30-minute, continually erasing cycle, and the incident occurred some 45 minutes before the flight landed" (A 52). Two years later, after this action was filed, the "investigation" was still in progress and still drawing national TV coverage for the NTSB.

In this context, how should the Court receive the affidavit of FAA's assistant chief counsel that after a search of the system in which records of this notorious investigation belong, "there are no such records contained in the system"? Such a response raises far more questions than it answers. To the obvious question of "why?" must be added some highly specific inquiries about defendants' complaince with the

Privacy Act.

Subsection (e)(4), A 97, requires annual publication in the Federal Register of a detailed description of all systems of records maintained by an agency. According to the published description of defendants' "General Aviation Aircraft Accident System" (A 106), it should contain "reports of accident investigation," "engineering analysis, witness statements, investigations analysis" and "pictures of the accident scene" concerning the 841 incident. One of the routine uses of the system is "to identify and monitor airmen involved in accidents," and the data is retrievable "by name, date of birth, and sex, social security numbers, airmen numbers and accident numbers." If any part of this description is incorrect, defendants have violated subsection (e)(4) of the Privacy Act. If the description is correct

but the information is not retrievable as proclaimed, then defendants have violated subsection (e)(5) of the Privacy Act.[21]

Furthermore, since the missing data played a part in a determination of probable cause adverse to plaintiffs, such utilization itself required integration of all supporting data into defendants' system.[22] The negative response of defenddants' system also raises questions about evasions of the Privacy Act through subdividing or organizing a system "so that information which would otherwise have been subject to the Act is no longer subject to the Act. For example...a separate index file to retrieve records by name."[23]

---

[21]Chapman v. NASA, 682 F.2d 526, 528-530 (11th Cir. 1982).

[22]Ibid.

[23]OMB Guidelines, 40 F.R. at 28963, quoted in Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982), p. 1377, note 15.

4. The exercise of this Court's certiorari jurisdiction is seriously burdened by the assertion of what amounts to discretionary review authority by three prior tribunals--an administrative agency and two courts--who, in the name of expedition, have denied evidentiary hearings without adequate explanation of their reasons.

Despite the notoriety of this case, the flight deck crew have been repeatedly denied access to any public forum where they could explain their own conduct and cross-examine the faceless Boeing experts who have charged them with unprofessional conduct.

Each time they have been denied a forum, denial has been based on the desireability of "summary proceedings." Thus, in the name of expedition, they were denied participation (over a dissent) in

the NTSB proceedings (A 57); then, under the rubric of "summary judgment," they were denied a jury trial in their defamation action--without being allowed any discovery. Finally, in the name of expedition, these prior denials have been summarily approved by an appellate court in a legal memorandum that cannot be published.

Summary dispositions of this kind give neither the appearance nor do they yield the substance of quality decisions, especially in the cumulative effect of adding one summary procedure to another. See Professors Reynolds and Richman article reaching these conclusions, "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573, 584.

There is an ancient common law remedy: more jury trials and fewer trials on af-

fidavits. This case perfectly illustrates the point. Three denials of a public forum have not quieted suspicions but fired them, and what was said by Learned Hand in Bozant v. Bank of N.Y., 156 F.2d 787, 790 (2d Cir. 1946) is peculiarly applicable here.

> In conclusion we cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on motion for summary judgment. This is especially true when the plaintiff must rely for his case on what he can draw out of the defendant....It appears to be somewhat difficult to persuade the district courts of this, but we are satisfied that it is true.

CONCLUSION

This Court should therefore grant the writ of certiorari. After review the case should be reversed and remanded for a thorough exploration of the issues through

discovery, after which defendants' summary judgment motions may be considered in light of the data uncovered in the discovey process.

LANDON DOWDEY

Counsel to petitioners

84-811

Office - Supreme Court, U.S.
FILED
NOV 16 1984
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

H.G. GIBSON, J. SCOTT KENNEDY,
and GARY N. BANKS, *Petitioners,*

v.

THE BOEING COMPANY, a corporation;
THE NATIONAL TRANSPORTATION SAFETY BOARD
and JAMES KING, Chairman;
THE FEDERAL AVIATION ADMINISTRATION,
and J. LYNN HELMS, Administrator, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

APPENDIX

110PP

Appendix Table of Contents

Memorandum Opinion by Ninth Circuit. . A 1

Ninth Circuit Order Denying Rehearing. A 8

Findings of Fact and Conclusions of Law by United States District Court for the District of Nevada, Boeing Company . . . . . A 9

Summary Judgment . . . . . A 17

Findings of Fact and Conclusions of Law by United States District Court for the District of Nevada, U.S. Governmental Agencies . . . . . A 18

Summary Judgment . . . . . A 25

Stipulation and Order Suspending Discovery. . . . . A 26

Excerpts from Plaintiffs' First Set of Interrogatories to Defendant Boeing Company . . . . . A 28

Plaintiffs' First Request of Defendant Boeing Company to Produce . A 42

Excerpts from Plaintiffs' First Set of Interrogatories to Defendants National Safety Board, James King, The Federal Aviation Administration, and J. Lynn Helms. A 43

Plaintiffs' First Request of Defendants The National Transportation Board, James King, The Federal Aviation Administration and J. Lynn Helms. . . . A 48

Page

Article from Journal of Air Line Pilots Association attached to plaintiffs' opposition to defendands' motions for summary judgement . . . . . A 49

Affidavit Invoking F R Civ. Pr. 56 (f) . . . . . A 64

Excerpts from Civl Docket CV-LV-81-157 . . . . . A 76

Statutes and Regulations Involved

Excerpts from the Federal Aviaion Act of 1958, Pub. L. 85-726, Title VII, 701, August 23, 1958 72 Stat. 781, as amended by Pub. L. 87-810, 1,2, Oct. 15, 1962, 76 Stat. 921, excerpt codified to:

49 USC 1441. . . . . A 81

Excerpts from the Transportation Safety Act of 1974, Pub. L. 93-633, Title III, January 3, 1975, 88 Stat. 2166, codified to:

49 USC 1901 et seq. . . . . A 83

Excerpts from the Privacy Act of 1974, Pub. L. 93-579, December 31, 1974, 88 Stat. 1897, as amended by Pub. L. 94-183, December 31, 1975, 89 Stat. 1057, codified to:

5 USC 552a . . . . . A 93

Federal Register of July 4, 1977 . . A 106

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2015

MEMORANDUM*

Appeal from the United States District Court for the District of Nevada
Roger D. Foley, District Judge, Presiding
Argued and submitted February 15, 1984

Before: ANDERSON, SCHROEDER, and ALARCON, Circuit Judges.

Appellants, three members of an airline flight crew, sued Boeing for defamation and the Federal Aviation Administration (FAA) and National Transportation Safety Board (NTSB) for violations of the Privacy Act, 5 U.S.C. § 552a (1982). In accordance with the agreement reached during oral argument, the

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided by Rule 21(c).

complaint is deemed amended to allege diversity of citizenship as the basis of jurisdiction over the suit against Boeing. We affirm the district court's grant of summary judgment in favor of all defendants.

1. Claim against Boeing

A. Statute of Limitations

The district court held that the plaintiffs' action against Boeing was barred by the statute of limitations. Appellants argue that they are not barred, because appellant Gibson's claim arises under the two-year Nevada statute of limitations, and because, regarding appellants Kennedy and Banks, the district court misconstrued the applicable limitations statute for the District of Columbia. We agree that Gibson's action was timely brought under the two-year Nevada statute of limitations. Although

federal courts must apply the statute of limitations and borrowing statutes of the state in which they sit, Alberding v. Brunzell, 601 F.2d 474 (9th Cir. 1974), Nevada's borrowing statute excepts citizens of Nevada. Nev. Rev. Stat. § 11.020.

With regard to the two non-Nevada appellants, the district court correctly held that the one-year District of Columbia statute of limitations bars their actions. Under Nevada's borrowing statute, tort claims arise in the state in which the last action necessary to the tort occurred. Brown v. Eiguren, 628 P.2d 299 (Nev. 1981). In a defamation suit this would be the location in which publication took place, here the District of Columbia. Restatement (Second) Conflicts of Laws § 149. While appellants claim that Boeing's report was published in several states, they have failed to alleged specific facts

or offer affidavits to support that claim in the face of a summary judgment motion with opposing affidavits. See British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979).

The district court denied appellants' motion under Federal Rule of Civil Procedure 56(f) to deny summary judgment based on excusable lack of discovery into the places of publication. In doing so the district court was within its discretion and amply justified. Appellants had entered into a stipulation limiting discovery against Boeing. They never sought to modify or withdraw from it or to conduct discovery outside its scope, although they had over a year to do so. Further, appellants' affidavit under Rule 56(f) did not ask for further discovery, and its description of what information

appellants allegedly were unable to obtain was neither specific nor credible. Programming Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1193-94 (9th Cir. 1980), addresses this very issue, holding that when the party bringing the Rule 56(f) motion has been dilatory in pursuing discovery, and fails to include specific goals for further discovery, it is proper for the district court to deny the motion. See also United States v. Little Al, 712 F.2d 133 (5th Cir. 1983); Securities and Exchange Commission v. Spence & Green Chemical Co., 612 F.2d 896 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981).

B. Privilege

Appellant Gibson's claim against Boeing fails because he has not raised any issue of material fact concerning whether, even assuming a conditional rather than an

absolute privilege, Boeing's statements to the NTSB constituted abuse of the privilege. Again, appellant argues that he was prevented from taking discovery on this point. Again, the argument fails. During the lengthy time between Boeing's motion for summary judgment and the hearing on the motion, appellant had ample opportunity to attempt to modify the stipulation limiting discovery or to pursue discovery outside the limits of the stipulation, and did nothing. Programming Engineering, Inc., 634 F.2d at 1393-94.

2. The Privacy Act Claims Against the NTSB and FAA

The district court found that it had no jurisdiction to hear appellants' claims under the Privacy Act, 5 U.S.C. § 552a (1982). The Privacy Act mandates certain requirements for government documents organized in "systems of records," which are records "from which information is

retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). According to the uncontradicted affidavits of the NTSB, the official files of the incident in this case were not organized in this fashion, and so fall outside the plain language of the statute. See Turner v. Prod, 707 F.2d 1109, 1114 (9th Cir. 1983) (courts look first to the plain language of the statute); Exner v. Federal Bureau of Investigation, 612 F.2d 1202, 1203-04 & n.4 (9th Cir. 1980) (Privacy Act covers records "which are found in a system of records" as defined by the Act). See also Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).

Affirmed.

[Filed April 9, 1984]

ORDER

[Filed July 20, 1984]

Before: ANDERSON, SCHROEDER, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehering en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CV-LV-81-157-~~HEC~~ /s/ RDF

~~PROPOSED~~ /s/ RDF FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed by Boeing December 7, 1981; entered by Court May 13, 1983]

Boeing's Motion for Summary Judgment having come on for a hearing before the Court on the 9th day of May 1983, the Court having read and considered the briefs filed by the parties and heard the argument of their counsel, and good cause appearing, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Plaintiffs are citizens of the United States and residents of Nevada, California, and Pennsylvania. Defendant The Boeing Company (Boeing) is a Delaware corporation which has its principal place of business in the State of Washington and does business in Nevada.

2. The amount in controversy under the complaint exceeds $10,000.

3. On April 4, 1979, plaintiffs were employed by Trans World Airlines as a flight deck crew and were operating a Boeing 727 aircraft at 39,000 feet in airspace near Flint, Michigan.

4. While being operated by plaintiffs the aircraft entered a spiral dive and descended to 5,000 feet before plaintiffs were able to stop the dive and reestablish the normal flying attitude for the aircraft.

5. Defendant The National Transportation Safety Board (NTSB), an independent agency of the United States charged by statute, 49 U.S.C.A. § 1903 (1976), with the duty to investigate aircraft accidents and incidents involving safety, such as the one in question here, together with defendant The Federal Aviation Administra-

tion (FAA), began an official investigation of the incident described in Finding 4.

6. During the course of its investigation the NTSB made an official request of Boeing for information pertaining to the investigation. The NTSB also requested Boeing to answer certain questions and express its opinion on the cause of the incident in issue.

7. Boeing responded to the NTSB request by preparing and transmitting to the Agency, in Washington, D.C., a report entitled "TW727, N840TW Maneuver Incident April 4, 1979, Over Lower Michigan." The report was received on October 1, 1979.

8. Following receipt of the Boeing report, the NTSB transmitted a copy of it to the FAA, the Airline Pilots Association and Trans World Airlines. Boeing did not disseminate the report, or any portion of

it, to anyone other than the NTSB and Boeing's attorneys.

9. The NTSB also received and considered information from sources other than Boeing during its two-year investigation, and on June 9, 1981, the Board concluded that the probable cause of the incident was something for which Boeing is not responsible.

10. The complaint in this case was filed on April 3, 1981; plaintiffs allege they were defamed by Boeing's report, in that the report is false with respect to plaintiffs and the probable cause of the April 4, 1979, incident and that Boeing knew of such falsity, or stated its opinions on probable cause with reckless disregard for the truth, or negligently.

11. Plaintiffs have not submitted an affidavit or referred the Court to any other source from which the Court could

conclude that their allegations against Boeing are founded on anything other than the delivery of Boeing's report to the NTSB in Washington, D.C., on October 1, 1979.

12. Any finding of fact which should be a conclusion of law shall be deemed to be a conclusion of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action against Boeing pursuant to 28 U.S.C. § 1332.

2. The claim of plaintiffs against Boeing arises under the law of Washington, D.C., where the alleged defamation of plaintiffs by Boeing occurred.

3. The law of Washington, D.C., requires an action for defamation to be commenced within one year of original publication, in this case October 1, 1979. D.C. Code Ann. § 12-301 (1966).

4. Plaintiffs' action against Boeing, having been commenced more than one year following October 1, 1979, is barred by limitation. D.C. Code Ann. § 12-301 (1966).

5. The statements made by Boeing in its report to the NTSB are absolutely privileged because they were in response to an official request from the NTSB during the course of an official investigation into the subject incident.

6. It is immaterial whether the NTSB investigation is labeled "quasi-judicial" or "quasi-legislative"; the overriding interest of the public in the free flow of information in such proceedings compels the conclusion that statements made by parties or witnesses should not subject them to an action for defamation, whether such statements are true or false. If the law was otherwise, few, if any, would

assist the NTSB in carrying out its vital, statutorily-mandated dury.

7. Boeing did not act with malice, negligently, or in reckless disregard of the truth in responding to the NTSB request for information and rendering its opinion on the probable cause of the incident, nor did Boeing, in any manner, abuse its privilege to provide information and opinions to the NTSB, whether the privilege is considered absolute or conditional.

8. The complaint against Boeing must be dismissed with prejudice.

9. Any conclusion of law more properly a finding of fact shall be deemed to be such.

DATED this 12th day of May, 1983.

/s/Roger D. Foley
United States District Judge

Submitted by:

LIONEL SAWYER & COLLINS

By /s/Steve Morris
Steve Morris
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CV-LV-81-157-~~HEC~~ /s/ RDF

~~PROPOSED~~ /s/ RDF SUMMARY JUDGMENT

[Submitted by Boeing December 7, 1981, entered by Court May 13, 1983]

In accordance with the Findings of Fact and Conclusions of Law entered by the Court this day, and good cause appearing, it is hereby

ORDERED, ADJUGED AND DECREED that the complaint against The Boeing Company be, and it hereby is, dismissed with prejudice, with costs to The Boeing Company as taxed by the Clerk in the amount of _____.

DATED this 12th day of May, 1983.

/s/Roger D. Foley
United States District Judge

LV-81-157-~~HEC~~ /s/ RDF

~~PROPOSED~~ /s/ RDF FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Submitted by federal agency defendants September 1, 1981; entered by the Court May 13, 1983]

/s/ RDF The United States of America, on the behalf of the federal defendants, submits the following Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On April 4, 1979, A Trans World Airlines Boeing 727 operating as Flight 841 ("TWA 841"), while cruising at an altitude of 39,000 feet, entered an uncontrolled roll and descended approximately 31,000 feet.

2. Plaintiffs Gibson, Banks, and Kennedy were the flight crew of TWA 841 on April 4, 1979.

3. The defendant National Transportation Safety Board and its Chairman, James

King, undertook and investigation of the TWA 841 incident to determine the probable cause.

2. Under the Federal Tort Claims Act, the district court does not have subject matter jurisdiction to entertain a lawsuit for defamation. 28 U.S.C. §2680(h).

3. An action for the common law tort of defamation does not implicate any constitutional interests. Paul v. Davis, 424 U.S. 693 (1976).

4. Under the provisions of the Privacy Act, an action may be brought only in the federal judicial district in which the plaintiff resides or has his principal place of business or in which the agency records or situated, or in the District of Columbia. 5 U.S.C. §552a(g)(5).

5. Under the Federal Tort Claims Act, venue is proper only in the judicial district where the plaintiff resides or where

the act or omission complained of occurred. 28 U.S.C. §1402(b).

6. Plaintiffs' allegations that the federal defendants failed to maintain accurate records cannot be maintained under the provisions of the Privacy Act because neither federal agencies sued in this action maintains a system of records subject to judicial scrutiny under the Privacy Act. 5 U.S.C. §522a(a)(5).

7. Plaintiffs' claim for the common law tort of defamation cannot be brought under the provisions of the Federal Tort Claims Act as such actions are barred by the "liable and slander" exception of that Act. 28 U.S.C. §2680(h).

8. Plaintiffs' allegation of alleged constitutional violations arising out of the common law tort of defamation are barred by the Supreme Court's decision in Paul v. Davis, 425 U.S. 693 (1976).

9. Venue is not proper in the District of Nevada in an action under the Privacy Act as to plaintiffs Banks and Kennedy.

10. Venue is not proper in the District of Nevada in an action under the Federal Tort Claims Act as to plaintiffs Banks and Kennedy.

4. After extensive investigation of the incident, the Safety Board determined that the crew's improper handling of the flight controls resulted in the uncontrolled descent of the aircraft.

5. As a result of the Safety Board findings, the flight crew of TWA 841 brought the present actions under the Privacy Act, 5 U.S.C. §552a et seq. and the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq.

6. The Safety Board maintains no system of records which pertain to the plaintiff's handling of TWA 841 on April 4,

1979.

7. Defendant Federal Aviation Administration and its administrator, J. Lynn Helms, do maintain a system of records concerning the plaintiff.

8. The FAA records contain no information relating to the plaintiff's handling of TWA 841 on April 4, 1979.

9. Before commencing the present action, plaintiffs did not file an administrative claim with the Federal Aviation Administration relating to the allegations of the present complaint.

10. At the time of the filing of this action, plaintiff Banks was a resident of the State of Pennsylvania.

11. At the time of the filing of this action, plaintiff Kennedy was a resident of the State of California.

To the extent that any findings of fact are found to be conclusions of law,

the Court will deem them to be conclusions of law.

CONCLUSIONS OF LAW

1. Before a lawsuit can be maintained against a federal agency under the provisions of the Privacy Act, the plaintiff must establish that the agency has under its control records "from which information is retrieved by the name or the individual or by some identifying number, symbol or other identifying particularly assigned to the individual." 5 U.S.C. §552a(a)(5).

11. Judgment will be granted in favor of the defendants, the National Transportation Safety Board, and its Chairman, James King and the Federal Aviation Administration and its administrator, J. Lynn Helms.

To the extent that any conclusions of law are found to findings of fact, the

Court will deem them to be findings of fact.

WHEREFORE, defendants the National Transportation Safety Board and its Chairman, James King and the Federal Aviation Administration and its administrator, J. Lynn Helms, are entitled to judgment against plaintiffs herein on the issue of liability as a matter of law.

DATED THIS 12th day of May 1983.

/s/Roger D. Foley

United States District Judge

LV-81-157-~~HEC~~ /s/RDF

Summary Judgment

/s/RDF ~~ORDER~~

[Submitted by the federal agency defendants September 1, 1981; entered by the Court May 13, 1983]

The United States of America, on behalf of the federal defendants, has moved for dismisal or for the entry of summary judgment in favor of the federal defendants. After full consideration of the moving and responding papers, it is hereby ORDERED that judgment be entered in favor of the National Safety Transportation Board and its Chairman, James V. King and the Federal Aviation Administration and its Administrtor, J. Lynn Helms and against plaintiffs Gibson, Banks and Kennedy.

DATE: May 12th 1983

/s/Roger D. Foley
United States District Judge

CIVIL NO. LV-81-157, HEC

STIPULATION AND ORDER

[Filed September 22, 1981]

It is hereby stipulated between defendant The Boeing Company and plaintiffs, through their respective attorneys, that responses to plaintiffs' first set of interrogatories to defendant Boeing Company, and responses to plaintiffs' first request of defendant Boeing Company to produce, shall be due 30 days following disposition by the Court of Boeing's motion to dismiss plaintiffs' complaint, which shall be filed by Boeing no later than September 28, 1981.

DATED this 9th day of September 1981.

By /s/Landon Dowdey
LANDON GERALD DOWDEY
Attorney for Plaintiffs

By /s/Steve Morris
STEVE MORRIS
Attorneys for Defendant
The Boeing Company

ORDER

IT IS SO ORDERED:

/s/HARRY E. CLAIBORNE
United States District Judge

DATED: September 21, 1981.

CIVIL NO. LV-81-157, HEC

[EXCERPTS FROM PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT BOEING COMPANY SERVED AUGUST 31, 1981]

Interrogatory No. 2: With respect to the allegations set forth in paragraph 2 of the complaint, namely:

> On or about April 4, 1979, at or near the airspace over Flint, Michigan, plaintiffs, as a professional flight deck crew employed by Trans World Airlines, were operating a certain aircraft designed and built by defendant Boeing when said aircraft, known as a Boeing 727, unexpectedly and for reasons unknown to plaintiffs, fell from an altitude of approximately 39,000 feet in a spiral dive to near 5000 feet before plaintiffs were able to regain control and avert a crash which most certainly would have taken the lives of 82 passengers and a flight crew of seven.

a. Describe any and all knowledge or information you have concerning the allegations set forth in paragraph 2 of the complaint (irrespective of whether you admit or deny such allegations and irrespective of whether you claim your knowl-

edge or information concerning such allegations is insufficient to form a belief as to the truth thereof).

b. Describe the time, place and substance of each and every event, occurrence, conversation or communication of which your knowledge or information concerning the allegations set forth in paragraph 2 of the complaint is composed or upon which it is based.

c. Describe the time, place and substance of each and every event, occurrence, conversation or communiction by which you acquired knowledge or information concerning the allegations set forth in paragraph 2 of the complaint.

d. State the names with home and business addresses of any and all persons present at any event, occurrence, conversation or communication (i) described in your answer to part (b) hereof, or

having knowledge thereof, or (ii) described in your answer to part (c) hereof, or having knowledge thereof.

e. State the nature, description, date, addressee, sender or party, of any and all documents known to you pertaining or referring to each and every event, occurrence, conversation or communiction (i) described in your answer to part (b) hereof, or containing information with respect thereto, or (ii) describe in your answer to part (c) hereof, or containing information with respect thereto. Set forth as to each such document its present location and the name and address of its custodian.

Interrogatory No. 3: With respect to the allegations set forth in paragraph 3 of the complaint, namely:

> Thereafter, defendants National Transportation Safety Board (NTSB) and Federal Aviation Agency (FAA) entered upon the performance of their investigative duties for the purpose of dis-

> charging their several statutory obligations to recommend and implement procedures which will contribute to an improvement in air safety. However, defendant NTSB turned over to an interested party, namely defendant Boeing, the conduct of most of its investigative and testing functions, knowing full well that said defendant had a strong economic and public relations incentive to shift any blame for the spiral dive away from themselves and onto the pilots of the aircraft, the only parties with whom defendant Boeing had no direct business dealings.

[Questions follow similar in form to those of Interrogatory No. 2.]

Interrogatory No. 4A: With respect to the allegations set forth in paragraph 4A of the complaint, namely:

> Defendant Boeing conducted its investigations and tests so as to support its claim that safety factors built into the 727 are so extensive that the spiral dive could not possibly have been precipitated by any mechanical or structural manufacturing or design defect in its aircraft.

[Questions follow similar in form to those of Interrogatory No. 2.]

Interrogatory No. 4B: With respect to

the allegations set forth in paragraph 4B of the complaint, namely:

> To this end its investigation attempted to explain away, as causative factors, (1) all noticeable defects, damaged and defective parts discovered after the aircraft landed in Detroit; (2) laboratory tests demonstrating preexisting damage to the #7 leading edge slat, fatigue and corrosion defects in the leading edge slat mechanism, fatigue and corrosion defects in the adjacent right outboard aileron mechanisms, and free play in the same aileron; and (3) other technical defects and deficiencies too numerous to mention. Boeing's investigation also ignored, or attempted to explain away, any possible defect in the #7 leading edge slat actuator and other parts which were never found.

[Questions follow similar in form to those of Interrogatory No. 2.]

Interrogatory No. 4C: With respect to the allegations set forth in paragraph 4C of the complaint, namely:

> Defendant Boeing then went beyond its assigned task as investigator of facts and scientific tests, and without waiting for all the evidence and tests to be finished, stated as conclusions: (1) The cause of the upset was some unauthorized cockpit

procedure engaged in by the flight deck crew; (2) had the crew taken prompt and appropriate action after their aircraft began to roll, they could have regained control easily; and (3) the last second recovery from the spiral dive and prevention of a major air disaster was fortuitous and due to circumstances for which the crew was only minimally responsible.

[Questions follow similar in form to those of Interrogatory No. 2.]

Interrogatory No. 4D: With respect to the allegations set forth in paragraph 4D of the complaint, namely:

The foregoing assertions by defendant Boeing (1) were published through its many agents, servants and employees, and in a written report to defendant NTSB where it became a part of the public record and widely circulated through official and aircraft industry channels and in the public media; (2) are false and based on theories unsupported by fact and discredited by tests; (3) were published with knowlege of their falsity or with reckless disregard for their truth, or negligently; (4) went beyond the scope of prescribed practice in NTSB and other accident investigations in that the stated conclusions were premature and amounted to a prejudgment before all the evidence was in; and (5) went beyond the purpose of the inquiry in

that the conclusions were motivated by an attempt to side-track any meaningful investigation of the airworthiness of the Boeing 727, the most widely used commercial aircraft in service today.

[Questions follow similar in form to those of Interrogatory No. 2.]

Interrogatory No. 11: With respect to the allegations set forth in your fourth affirmative defense of your answer, namely:

FOURTH AFFIRMATIVE DEFENSE

The communications complained of by plaintiffs were made by Boeing to the FAA or NTSB and pertain to the incident of April 4, 1979, and are protected by absolute privilege, in that they provided relevant information to public officials acting in a quasi-judicial or quasi-legislative capacity.

a. State (i) the legal, and (ii) the factual basis for such allegations.

b. State the time, place and substance of each and every event, occurrence, conversation or communication with which such

allegations are concerned or upon which they are based.

c. State the time, place and substance of each and every event, occurrence, conversation or communication by which you acquired knowledge or information concerning such allegations.

d. State the names with home and business addresses of any and all persons present at any event, occurrence, conversation or communication (i) described in your answer to (b) hereof, or having knowledge thereof, or (ii) described in your answer to part (c) hereof, or having knowledge thereof.

e. State the nature, description, date, addressee, sender or party, of any and all documents known to you pertaining or referring to each and every event, occurrence, conversation or communication (i) described in your answer to part (b)

hereof, or containing information with respect thereto, or (ii) described in your answer to part (c) hereof, or containing information with respect thereto. Set forth as to each such document its present location and the name and address of its custodian.

Interrogatory No. 12. With respect to the allegations set forth in your fifth affirmative defense of your answer, namely:

FIFTH AFFIRMATIVE DEFENSE

> The conclusions complained of by plaintiffs were expressed by Boeing as a result of tests assigned to Boeing by NTSB in connection with the investigation of the incident on April 4, 1979, and, as such, are protected as opinion and as fair comment, because they are based on facts truly stated in a matter of public interest and concern, made in good faith, without malice, in the reasonable belief that they are true.

[Questions follow similar to those of Interrogatory No. 11]

Interrogatory No. 13: With respect to the allegations set forth in your sixth affirmative defense of your answer, namely:

SIXTH AFFIRMATIVE DEFENSE

> Plaintiffs are public figures and, therefore, may not recover for defamation absent clear and convincing proof of false statements published with knowledge they were false, or with reckless disregard of whether they were false or not, all of which Boeing denies.

[Questions follow similar to those of Interrogatory No. 11]

Interrogatory No. 17: (a) Describe what initial investigations, tests, or studies you made or caused to be made, with respect to the accident (or incident) of April 4, 1979 with which this action is concerned.

(b) State the time, place and substance of each and every event, occurrence, conversation or communication

involved in your initial investigations, tests or studies.

(c) State the names with home and business addresses of any and all persons present at any event, occurrence, conversation or communication described in your answer to part (b) hereof, or having knowledge thereof.

(d) State the nature, description, date, addressee, sender or party, of any and all documents known to you pertaining or referring to each and every event, occurence, conversation or communication described in your answer to part (b) hereof, or containing information with respect thereto.

Interrogatory No. 18. (a) Describe all subsequent investigations, tests or studies you made, or caused to be made, with respect to the accident (or incident) of April 4, 1979, with which this action

is concerned.

[Subparts (b), (c), and (d) are similar to those of Interrogatory 17]

Interrogatory No. 19: (a) Describe what other investigations, tests or studies you referred to, or examined, in the course of conducting your investigations, tests and studies with respect to the accident (or incident) of April 4, 1979, with which this action is concerned.

[Subparts (b), (c), and (d) are similar to those of Interrogatory 17]

Interrogatory No. 20: (a) Describe each and every conversation or communication of any kind you had with officials or employees of defendant NSTB with respect to the accident (or incident) of April 4, 1979, with which this action is concerned.

[Subparts (b), (c), and (d) are similar to those of Interrogatory 17]

Interrogatory No. 21: (a) Describe each and every conversation or communication of any kind you had with officials or employees of defendant FAA with respect to the accident (or incident) of April 4, 1979, with which this action is concerned. [Subparts (b), (c) and (d) are similar to those of Interrogatory 17]

Interrogatory No. 22: (a) Describe each and every conversation or communication of any kind you had, directly or indirectly, with the general or specific segments of the public, especially with representative or employees of news media, respecting the accident (or incident) of April 4, 1979, with which this action is concerned.

[Subparts (b), (c), and (d) are similar to those of Interrogatory 17]

A 42

CIVIL NO. LV-81-157, HEC

PLAINTIFFS' FIRST REQUEST OF DEFENDANT BOEING COMPANY TO PRODUCE
[Served August 31, 1984]

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant The Boeing Company produce and permit plaintiff to inspect and to copy the document described by it in answer to parts (e) of each of the paragraphs numbered 2 through 14 of plaintiffs' first set of interrogatories to said defendant, and to paragraph 16 (m) thereof, and to parts (d) paragraphs numbered 17 through 22, and part (a) paragraph 23, to the extent that such documents are shown by said answers to be in the custody or control of said defendant.

CIVIL NO. LV-81-157, HEC

[EXCERPTS FROM PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS NATIONAL TRANSPORTATION SAFETY BOARD, JAMES KING, THE FEDERAL AVIATION ADMINISTRATION, AND J. LYNN HELMS Served August 31, 1981]

Interrogatory 5A: With respect to the allegations set forth in paragraph 5A of the complaint, namely:

> On or about April 10, 1979, and thereafter, defendant FAA, acting by and through its duly authorized agents, determined and published through official and aircraft industry sources and to the public media, the groundless assertion that plaintiffs had intentionally erase the cockpit voice recorder in order to conceal information about their conduct respecting the spiral dive.

a. Describe any and all knowledge or information you have concerning the allegations set forth in paragraph 5A of the complaint (irrespective of whether you admit or deny such allegations and irrespective of whether you claim your knowledge or information concerning such allegation is insufficient to form a be-

lief as to the truth thereof).

b. Describe the time, place and substance of each and every event, occurrence, conversation or communication of which your knowledge or information concerning the allegations set forth in paragraph 5A of the complaint is composed or upon which it is based.

c. Describe the time, place and substance of each and every event, occurrence, conversation or communication by which you acquired knowledge or information concerning the allegations set forth in paragraph 5A of the complaint.

d. State the names with home and business addresses of any and all persons present at any event, occurrence, conversation or communication (i) described in your answer to part (b) hereof, or having knowledge thereof, or (ii) described in your answer to part (c) hereof, or having

knowledge thereof.

e. State the nature, description, date, addressee, sender or party, of any and all documents known to you pertaining or referring to each and every event, occurrence, conversation or communication (i) described in your answer to part (b) hereof, or containing information with respect thereto, or (ii) described in your answer to part (c) hereof, or containing information with respect thereto. Set forth as to each such document its present location and the name and address of its custodian.

Interrogatory 5B: With respect to the allegations set forth in paragraph 5B of the complaint, namely:

> Sometime during September or October, 1979, and thereafter, defendant NTSB, acting by and through its duly authorized agents, determined and published through official aircraft industry sources and to the public

> media the groundless assertions that plaintiffs had (1) engaged in some unauthorized procedure which precipitated the loss of control of the aircraft they were piloting; (2) had not taken appropriate action to regain control of said aircraft; and (3) had not been responsible for regaining control of the aircraft and saving the lives of themselves, their passengers and crews.

[Questions follow similar to those of Interrogatory No. 5A]

Interrogatory 5C: With respect to the allegations set forth in paragraph 5C of the complaint, namely:

> Plaintiffs are further informed and believe that other determinations adverse to them have been made by defendant government agencies which cannot be specified without discovery from said defendants.

[Questions follow similar to those of Interrogatory No. 5A]

Interrogatory 5D: With respect to the allegations set forth in paragraph 5D of the complaint, namely:

> In respect of the foregoing matters, defendant government agencies

acted in a manner which was intentional or willful.

[Questions follow similar to those of Interrogatory No. 5A]

CIVIL NO. LV-81-157, HEC

PLAINTIFFS' FIRST REQUEST OF DEFENDANTS THE NATIONAL TRANSPORTATION SAFETY BOARD, JAMES KING, THE FEDERAL AVIATION ADMINISTRATION, AND J. LYNN HELMS TO PRODUCE
[Served on August 31, 1981]

Plaintiffs hereby request that defendants The National Transportation Board, James King, The Federal Aviation Administration, and J. Lynn Helms produce and permit plaintiffs to inspect and to copy the document described by it in answer to parts (e) of each of the paragraphs numbered 2 through 7 of plaintiffs' first set of interrogatories to said defendant, and to paragraph 9(m) thereof, and to part (d) of each of the paragraphs numbered 10 through 13 and part (e) of paragraph 16, to the extent that such documents are shown by said answers to be in the custody or control of defendant.

FLIGHT 841: The Nightmare Continues

By C. V. Glines

More than two years ago in the night sky over Michigan, the passengers and crew of TWA Flight 841 lived through those few, unimaginable moments of terror that immediately precede a crash. Only the quick thinking of the crew averted imminent disaster.

The cause of this near-catastrophe has been the subject of controversy ever since. Hailed as heroes immediately after the accident, the crew almost overnight found themselves recast as villains.

This, the first of a two-part article on the TWA Flight 841 accident, recounts the history of the flight itself, the subsequent wave of publicity that engulfed the crew, the cross-currents of rumor and speculation in the case, and the conclusions of the aircraft manufacturer's investigation into the alleged causes.

On the night of Wednesday, April 4, 1979, Trans World Airlines (TWA) Flight 841 with Capt. H. G. "Hoot" Gibson in command was flying atop a cloud layer in bright moonlight. The Boeing 727 was cruising at 39,000 feet on autopilot between New York's John F. Kennedy International Airport (JFK) and Minneapolis when, with little warning of trouble, it pitched into an uncontrollable spiraling dive near Saginaw, Mich. In less than a minute, the plane lost about 34,000 feet of altitude as Gibson and First Officer J. S. Kennedy tried a number of emergency measures. In one last attempt to halt the death spiral, Gibson shouted for gear down. The spiraling gradually stopped, and the plane recovered from the dive at about 5,000 feet.

Captain Gibson landed the B-727 safely at Detroit. A few of the 82 passengers aboard sustained minor injuries. The aircraft's landing gear and doors were damaged, and the lower fuselage skin was wrinkled. The No. 7 leading-edge slat and the No. 10 spoiler were missing. The No. 7 slat was found later in two pieces; its associated actuator assembly has never been found.

Exactly what happened that night over Michigan has become the subject of one of the longest running investigations in the history of the National Transportation Safety Board (NTSB). What happened to the crew after the accident has become the subject of lawsuits totaling $20 million brought by the three crew members against the Boeing Company, the Federal Aviation Admin-

istration (FAA), and NTSB.

Here is the history of the flight as reported shortly after the accident by Capt. J. A. McIntyre (TWA), ALPA's on-site coordinator.

"TWA 841 departed JFK at 1939 (EST [eastern standard time]), off at 2025 enroute to Minneapolis-St. Paul. At 2136, the aircraft left Flight Level 350 and arrived at Flight Level 390 at 2145. Five minutes later, while level in smooth air at Mach .80, 252 knots indicated airspeed, with aircraft weight approximately 128,000 pounds, the crew felt a slight vibration or 'buzz.'

"The aircraft then started to roll right and pitch down, with the autopilot attempting to correct with left aileron and rudder. The plane continued into a right spiraling dive with a marked increase in aircraft vibration. Throttles closed and spoilers extended had no effect on the dive. At this time the heading direction indicator (HDI) showed all black (except for the fixed blue border at the top), and the altitude was unwinding extremely rapidly. 'So fast, I couldn't read it,' according to Captain Gibson.

"Between Flight Level 200 and 15,000 feet, moving the spoiler handle down and up produced no reaction, nor did forward and backward movement of the yoke. At about 15,000 feet, the crew extended the landing gear as a last resort and 'it came out like a shot,' according to the crew's testimony. Shortly thereafter, the spiraling stopped, and with gentle pressure on the yoke, the aircraft recovered from the dive in the clouds. They then climbed back on top and leveled off at 13,000 feet.

"After the recovery, the crew noted they had an 'A' system hydraulic failure that probably occurred when the gear was extended at high speed (around Mach .95). There were 0.8 gallons of fluid remaining and no hydraulic pressure, and the lower yaw damper warning flag showed. The aircraft was still buffeting moderately. The flight then proceeded to Detroit. While enroute, the captain flew the aircraft, the first officer and the flight engineer completed the checklists, and the cabin team prepared for an emergency landing.

"Following the system fluid loss checklist, the alternate flap extension checklist was started. When the alternate flap switches were activated, the remaining leading-edge devices extended and the plane started to roll to the left. Immediate retraction was attempted, but the leading-edge slats remained out and locked, with No. 7 missing. The trailing-edge flaps were retracted, and Gibson was able to control the plane.

"At this point, the red unsafe lights showed for all the gear. They manually lowered the nose gear, and it showed green with a decrease in buffeting. Manually extending the main landing gear did not produce a down-and-locked indication. They then performed a fly-by of the tower to get a gear check [using spotlights from Detroit Tower] and evaluated the go-around capability. The cabin team reported the cabin ready.

"A smooth, no-trailing-edge-flap landing was made at 2231 (EST) on Runway 3L at Detroit, using full right aileron and rudder plus differential thrust. On the flare, however, the aircraft tried to roll uncontrollably to the left until the left main gear touched down, then right main and nose gear. The touchdown speed, according to the FDR [flight date recorder] was 187 knots.

"As they turned off the runway to the right and stopped, the tower advised there had been a shower of sparks from the right main gear on rollout. At this time, TWA lead mechanic Mel Brown arrived at the plane with the Detroit Airport Fire Department. Unable to insert a gear pin in the right main gear due to its damaged condition, he ran forward and plugged into the aircraft interphone system. He advised the crew that the sparks had come from the gear door hanging below the tire; there was no fire but there was some fluid in the area. The crew elected to deplane via the rear stairs, called for ground transportation and left the aircraft behind the passengers.

"The damage to the right main gear was such that, when jacks were placed under the plane, the gear folded of its own accord. On-site repairs were made, and the aircraft was flown to Kansas City for further extensive testing and repair work."

The moments of terror experienced by the crew that night have been followed by months of nightmares. Although their superb airmanship in recovering from the upset elicited praise from their fellow pilots and initially from officials investigating the accident, before long it was implied publicly that, in fact, the crew had caused the upset.

About three hours after the accident, two FAA inspectors, Ronald L. Montgomery and Roger V. Gordon, called on Gibson in his hotel room.

Gibson told them, "You know, we have always been told not to talk to you [FAA] when something happens like this . . . but I can't see it, as I don't have anything to hide. I really don't know what happened."

After the inspectors left, Gibson realized that he and his crewmates might need some support from fellow pilots. Early the next morning he called Capt. Jim McIntyre, the TWA representative on ALPA's national accident investigation board. First Officer Tom Kennedy, Council No. 2 vice-chairman who lives in Detroit, was at the scene within minutes. Capt. Jerry Lawler, Council No. 25 chairman, arrived shortly thereafter. They stayed with the crew until McIntyre arrived, shielding them from news reporters and photographers who had begun to descend on the scene.

At the initial hearing the next afternoon, the three crew members were hailed as heroes. FAA and NTSB representatives applauded them. Individuals stood up to say how proud

"...moving the spoiler handle down and up produced no reaction, nor did forward and backward movement of the yoke. At about 15,000 feet, the crew extended the landing gear as a last resort and 'it came out like a shot.'..."

they were to be in the same industry with such capable pilots. In this atmosphere, the three pilots, still shaken from their brush with disaster, let down their guard. Their innocence was obvious to everyone present and unequivocally accepted.

"Smoking gun"

The nightmares began for the crew a few days later when FAA and NTSB revealed to the press the discovery that the cockpit voice recorder (CVR) tape had been erased. The announcement implied that the crew had been doing something in the cockpit that they shouldn't have been doing, something that would have been revealed by their conversation on the tape. In pursuing this perplexing case, frustrated investigators suddenly saw a "smoking gun".

Captain Gibson has testified under oath that he does not remember erasing the tape himself or seeing anyone else do it. Although tape erasure is not on the checklist, Gibson stated that he usually erases the tape after every flight. He believes it is possible that he erased it out of habit, but he does not recall doing so.

Even if Flight 841's CVR had not been erased, none of the conversation that had taken place during the unexplained roll and dive would have remained on the flight's final tape. CVRs work on a 30-minute, continually erasing cycle, and the incident occurred some 45 minutes before the flight landed. This fact and the fact that the No. 7 slat had broken off the aircraft apparently did not impress the investigators or reporters as important. Early news accounts dwelled on the blank CVR tape.

NTSB held a public hearing in Los Angeles on April 12, 1979. All three crew members testified about the events of their night of terror. James S. Dillman, deputy assistant chief counsel for FAA, focused much of his questioning on the tape erasure.

News reporters pursuing the story of the erased tape continued to hound the three crew members. After days of harassment, Gibson awoke one morning to find his living room full of TV camera crews and reporters all set up for a formal press conference. Finding his front door open, they had walked in and plugged their lights, recorders, and cameras into his outlets. He did not grant the interviews they sought or the interview sought by a wire service reporter who offered him $500 for an exclusive.

Having gotten the whiff of a sensational story, some reporters went to even more bizarre lengths to get a scoop. A reporter for a tabloid newspaper not noted for its integrity overheard a conversation in Florida during which a relative of one of the crew members was believed to have said something about a fight in the cockpit of Flight 841. Based on this shred of information, the editor of the tabloid assigned three reporters to visit the homes of the three cockpit members in California, Nevada, and Pennsylvania. The reporters were apparently instructed to converge on the three pilots at approximately the same time and get their responses to questions about the alleged fight. One of the reporters posed as a doctor, even to the extent of carrying a physician's black bag, and told First Officer Scott Kennedy that he had been on the flight that night. He said he'd heard that the flight engineer told the press that there had been a fight in the cockpit. By this time wary of such encounters, Kennedy replied simply, "I know Gary Banks said no such thing. Please leave."

Circuit breaker conjecture

Some published news reports included interviews with anonymous persons who claimed to know what had *really* happened. Since a B-727 only staggers along at altitudes around 40,000 feet, some pilots were said to have developed an unofficial technique to provide additional lift by deploying the trailing-edge flaps to the first notch on the quadrant (about 2 degrees) to achieve a more efficient cruise speed. To ensure that the leading-edge slats don't extend, it is alleged that some pilots pull the circuit breaker for the slats, thus preventing their deployment. It was conjectured that had Gibson done this while Gary Banks, the flight engineer, was momentarily absent from the cockpit, Banks could have reflexively pushed it in when he returned, thus causing the slat to come out and break off.

The crew members immediately and vehemently denied they did anything of the sort. Captain Gibson has stated that he never heard of this technique before the accident and has been unable since to locate anyone who has tried it or who knows anyone who has tried it.

Leslie D. Kampschror, the NTSB investigator, informed the press that he *had* heard of it. Kampschror reportedly told *The Aviation Consumer*, "I assume they're hiding something, but I can't prove it." He later denied making this statement. He is also quoted as saying, "I think those guys were fooling around up there, and I don't think we really know what they were doing yet."

(Incredibly, neither NTSB nor FAA has *ever* questioned the crew about the circuit breaker theory, although NTSB did question the crew at length about the movements of the flight engineer. Gary Banks testified that he did not recall leaving the cockpit during the flight. Although none of the passengers of Flight 841 has ever been questioned by government investigators about anything that occurred that night, one woman passenger who had been sitting in the first-class cabin near the cockpit door sought to defend the pilots against these charges. After accounts of this aspect of the controversy hit the news, she wrote a letter to the editor of the *St. Paul Pioneer Press* in which she verified that none of the pilots left the cockpit at any time during the flight.)

"Gibson told them, 'You know, we have always been told not to talk to you (FAA) when something happens like this ... but I can't see it, as I don't have anything to hide. I really don't know what happened.'"

In addition to the press and the government investigators, some pilots and their airline managements lent credence to the circuit breaker theory. One ALPA pilot attending recurrent training reported that an instructor told the class that NTSB had already made its finding of probable cause and that the crew of TWA Flight 841 had partially extended the flaps and had pulled the

circuit breakers. He said the spiral began when the flight engineer returned to the cockpit and reset the circuit breakers.

The pilot protested to the instructor that this information was not true and should be deleted from the class presentation. When this pilot took his recurrent training the next year, the same information was still being presented as fact in the classroom. This time the pilot protested in writing to the company's vice-president for flight operations. Finally, the instructor's personal analysis of the accident was deleted from further classroom presentations.

Boeing's scenario

While this kind of misinformation was being perpetuated, ALPA engineering and air safety pilots and staff members pursued their own in-depth investigation of why and how the No. 7 slat could have become extended in flight. They asked NTSB for an objective analysis to include metallurgical examination of the recovered No. 7 slat and flight simulations. Boeing conducted the tests and the subsequent report showed that there was "some preexisting T-bolt fastener and angle attach damage at the No. 7 inboard track-to-slat attachment point." The manufacturer's analysis alleged a seven-step scenario as follows:

"(1) A positive system command was initiated within the slat extension system that extended leading-edge slats.

"(2) A positive system command was initiated to retract the leading-edge slats.

"(3) The preexisting structural fracture of the T bolt and cracking damage of the bracket angle at the inboard slat track attachment point caused the No. 7 slat actuator rod to distort under air load forces and to bind and prevent retraction.

"(4) The rolling moment caused by the asymmetry of the extended No. 7 slat was not appropriately controlled by the flight crew, although it was within the capability of the airplane to do so at normal speeds.

"(5) The improperly controlled rolling moment coupled with a large increase in airspeed resulted in a high-speed spiral descent which created air loads that approached the airplane's structural limits.

"(6) The No. 7 slat departed the airplane as air loads increased with increasing airplane speed.

"(7) Departure of the slat eliminated the primary cause of the rolling moment, and control of the airplane was regained."

Translation: Someone in the cockpit put the slats out and then tried to get them back in. A weakened bolt prevented No. 7 slat from retracting, causing the aircraft to roll. The pilot didn't correct soon enough. Therefore, the pilot caused the accident. □

Next month, Part II examines ALPA's investigation of the accident, NTSB's determination of probable cause, and the continuing search for a fair representation of the facts.

FLIGHT 841 part II

By C. V. Glines

Last month, Part I of the story of Flight 841 recounted the sudden, spiraling dive of a TWA B-727 on the evening of April 4, 1979, and the accusations leveled at the crew soon after the accident. Confronting the rumor and speculation surrounding the case, ALPA pursued its investigation of the accident and called for an objective analysis of the recovered parts and for flight simulations. Boeing conducted tests and subsequently blamed the pilot for failing to correct the rolling of the aircraft after allegedly extending the slats and attempting to retract them.

Captain Gibson and his crew would soon learn that the horror of Flight 841 only began in the sky over Michigan. This, the second of a two-part article, examines ALPA's investigation of the accident, the National Transportation Safety Board's determination of probable cause, and the aftermath of the board's decision.

ALPA's air safety investigators could not accept Boeing's less-than-objective opinion and the statements attributed to investigator-in-charge Leslie D. Kampschror of the National Transportation Safety Board (NTSB). President J. J. O'Donnell protested to James J. King, NTSB chairman, that the "integrity and credibility of this investigation have been seriously compromised by these intemperate comments" and that the implications against the crew "impugn their honesty and professionalism and also have caused irreparable damage to their personal and professional reputations."

ALPA's analysis of the investigation to this point showed that no genuine effort was being made by NTSB to determine the reason for the extension of the No. 7 slat. ALPA's check of B-727 service difficulty reports revealed a continuing problem with slats and slat actuators, with a resulting loss of hydraulic pressure in the A system, ever since the aircraft had been introduced. In May 1970, former NTSB Chairman John H. Reed had informed Federal Aviation Administration (FAA) Administrator John H. Shaffer that in the previous year there had been "at least 15 instances of main-wing leading-edge slat actuator failure" in air carrier operations. "This, in our opinion, constitutes a hazard to flight," he said. FAA Acting Administrator K. M. Smith disagreed, saying that the procedures recommended by NTSB were not a contributing factor in failures of the actuator piston rods, and added, "For your information, we find that loss of the slat system does not present a control hazard to the airplane."

In August 1975, a *Boeing Operations Manual Bulletin* concerning the possibility of a malfunction of the leading-edge slat actuator lock rings noted, "In the

event that System A pressure is lost during conditions coincident with a fractured retract lock ring, unintentional deployment of the slat may occur and significant lateral control inputs would be required to prevent high roll rates."

ALPA found that over 400 service difficulty reports had been filed by various airlines since 1974, indicating many slat problems on the B-727. Trans World Airlines (TWA), especially aware of the problem after this accident, reported a number of actuator replacements and discovered increased wear on slat tracks and trunions. Wear was particularly evident on the older 727s. The aircraft flown by Capt. H. G. "Hoot" Gibson and his crew was one of the first three 727s purchased by TWA.

Boeing was well aware of the slat problem through these reports. In 1975, the company conducted tests to determine the effects of high-speed asymmetrical slat deployment, specifically the No. 7 slat and its mate on the left wing, the No. 2 slat. ALPA requested this test data from Boeing through the NTSB, but none was ever furnished.

ALPA's analysis

From their own analysis of the accident, ALPA investigators believe that in-flight extension of the No. 7 slat occurred without initiation by the crew. Although aerodynamic pressures would normally keep the slat flush against the wing, there is evidence that an upward float of the outboard aileron and preexisting slat misalignment could produce forces on the slat that would force it out. According to ALPA's analysis of the flight data recorder (FDR) tape, the outboard aileron played a definite part in the slat deployment in that an upward float would tend to counteract a pilot's control inputs.

It is also possible, in ALPA's view, that the main piston seal in the No. 7 slat actuator may have failed, causing parts of the seal to clog an orifice. The failure could have been caused by distortion loads acting on the actuator for some time. There is also the connection with the A system hydraulic fluid loss, although the exact moment of the system's failure cannot be ascertained. A large number of service difficulty reports have been submitted on A systems problems and system hydraulic fluid losses due to leading-edge slat actuator failure. There is also considerable evidence, in ALPA's view, that a combination of the above conditions occurred to cause the extension of the slat and the resultant roll to the right.

"We believe preexisting fatigue, corrosion, and component failures with the No. 7 leading-edge slat and right outboard aileron mechanisms caused the No. 7 leading-edge slat to extend," ALPA investigators stated in their report to NTSB. "We further believe the free play in the right outboard aileron played a significant role in controllability of the aircraft and initiation of the maneuver."

Despite the logical scenario developed by ALPA, NTSB staff members were not convinced and pursued their theory that the crew was directly responsible. At a meeting on Jan. 17, 1980, NTSB staff members outlined three methods by which a crew could cause the slat to be extended in flight. The method the staff termed most likely to have been used by the TWA crew involved pulling the circuit breaker for the slats so that they would stay in while the flaps were extended. *Aviation Consumer* noted wryly, "But it's not hard to imagine what would happen if the flight engineer accidentally popped the wrong circuit breaker."

The board members decided to ask

for additional testimony from all three crew members, but proposed to limit their questions to the reported absence of the flight engineer from the flight deck just before the upset. Board member Francis H. McAdams strongly disagreed with this limitation.

"As I have repeatedly stated," he said in a dissenting statement, "in view of the fact that not only the credibility and professionalism of the crew but also the airworthiness of the B-727 are an issue in this proceeding, the crew should be given the opportunity to comment upon all of the evidence on which the board will ultimately base its final determination of cause. The crew has never been afforded this opportunity. . . . It is obvious that the crew's knowledge of the facts of the accident is the best evidence unless there is other evidence that overwhelmingly controverts that of the crew. This is not the instant case, since the crew's knowledge has not been tested against the physical evidence. In this respect, the evidence we now have, without supporting or controverting testimony of the crew, is in large part circumstantial and based upon speculation."

McAdams asked for "a full and candid dialogue with the crew during the second deposition" which, as he pointed out, could only be accomplished if the scope of issues was broadened. He was overruled by Chairman James B. King.

Heated exchange

The depositional proceeding was held on Jan. 29, 1980, during which NTSB's Leslie D. Kampschror became upset over a line of questioning by an ALPA attorney and "lost his cool," according to one witness. ALPA President J. J. O'Donnell subsequently wrote to NTSB Chairman King, asking that Kampschror be taken off the case because he was "no longer a neutral and impartial investigator in regard to this accident." The request was denied. (The emotional outburst by Kampschror does not appear in the official transcript for reasons never explained.)

On Oct. 2, 1980, at ALPA's request and with NTSB approval, a flight test was conducted on a Boeing 727-100 to establish an FDR trace signature for comparison with TWA 841's FDR to test the scenario in which only trailing-edge flaps are extended and then leading Slats 2,3,6 and 7 are added. The test results showed significant dissimilarity between the FDR traces in the test and those on the accident aircraft. ALPA investigators concluded, "While intentional flap extension may have been used by certain pilot groups such as the military and their reserve components, neither ALPA nor the NTSB staff has found any such in-flight practice to exist among airline pilots. In fact, the Boeing flight test conducted on Oct. 2, 1980, confirms that there is a performance decrease using this technique on the Boeing 727-100. Captain Gibson's background contains no military experience."

As part of its continuing effort to fill in the gaps left by NTSB's selective investigation of the incident, ALPA's air safety team sought to locate the missing slat actuator parts in October 1980. A $500 reward was posted in the area under the flight's path for anyone finding "a metal cylinder approximately 12 inches long and between 2 and 3 inches in diameter."

Although these parts have not yet been found, a piece of the missing right outboard aileron trim tab was recovered. Because it was this aileron that had measurable free play, ALPA considered the discovery an important

clue. ALPA delivered the trim tab to the FAA control tower chief at Tri-City Airport in Saginaw for safekeeping. Investigator Kampschror, however, did not request that the part be delivered to NTSB for metallurgical analysis, stating that he was unsure of its significance. By the end of June 1981, he had not even informed the other parties in the investigation or other NTSB staff members that this piece of evidence had been found. As a result of ALPA's protests, Kampschror finally agreed to send it to Washington for analysis.

Procedural problems

NTSB staff members have made a number of monumental mistakes in conducting this investigation. Foremost among them was the public presupposition, based on the tape erasure, that the crew was at fault. In general, there has been a lack of enthusiasm to pursue any of the several other potential causes that ALPA uncovered. In a March 1981 letter forwarding ALPA's conclusions to Chairman King, Capt.

"In this respect, the evidence we now have, without supporting or controverting testimony of the crew, is in large part circumstantial and based upon speculation.'"

James A. McIntyre, ALPA coordinator, recommended these procedural changes:

"The NTSB should restate, in the strongest possible language, its long-established policy against parties, witnesses, and staff expressing opinions and conclusions as to the probable cause of an accident while the investigation is in progress.

"The NTSB should establish a suitable forum for the full and impartial examination of all the evidence and witnesses pertinent to the investigation. Such a forum could be either a public hearing or an expanded depositional proceeding presided over by a member of the board.

"Current NTSB procedures place an unwarranted burden on the investigator-in-charge and the limited composition of the technical staff. In this case, hypotheses not supported by fact have been presented as hard evidence without an opportunity for full cross-checking and validation by all the interested parties. The investigator-in-charge, in effect, becomes the sole arbiter of the evidence and analysis presented by the staff to the board. Often the scope of the evidence is outside the staff's technical expertise and competence. This results in the interested party with the greatest resources and manpower actually conducting the investigation, in many instances.

"The FDR played a significant part in the investigation, yet it presented innumerable difficulties. First, the accuracy and fidelity of FDR data are not fully understood. Three years ago, at the request of ALPA, the board undertook a scientific evaluation to determine the accuracy of recorder data. Yet to date, the results of this study have not been completely analyzed. Furthermore, only limited investigation of possible recorder errors was conducted. For instance, the effect of gimbal errors which produced the large heading change to the left in the TWA 841 case was apparently a mystery to

the staff. It was only after ALPA produced other similar flight recorder readouts of aircraft which had rolled that the staff agreed to the gyro tests at Kansas City. The board should have catalogued all the known potential errors so that future investigations are not hampered.

"Second, the limited number of output parameters on the subject FDR have presented severe difficulties in determining the actual maneuver performed by the aircraft. Recorders with many more parameters, including pitch and roll attitude, have been in airline use on widebody aircraft for years. Yet new-production aircraft are still entering service with FDRs of the same type as that used on the subject aircraft. We feel it would be highly desirable that all new production aircraft be equipped with newer digital FDRs having an increased number of recording parameters. Furthermore, it would be desirable to retrofit this type of recorder to aircraft which will be in fleet use for an extended period of time."

Sunshine meeting

On June 9, 1981, NTSB held its long-awaited open ("sunshine") meeting to determine the probable cause of this accident. Only three of the five board members were present: Vice-Chairman Elwood T. Driver, Francis McAdams, and G. H. Patrick Bursley. The other two members, Chairman James B. King and Patricia A. Goldman, did not attend. The meeting was covered by four television teams and several newspaper and radio reporters.

The NTSB staff presentation and questioning by the three board members lasted five hours. The staff alleged that the crew extended the wing flaps two degrees and then put out Slats 2, 3, 6, and 7. The slats were then retracted, except that the No. 7 slat remained out because of its track misalignment. This asymetrical condition caused the plane to roll 35 degrees to the right. Gibson, according to the staff, brought the wings level and then relaxed on the controls. When he did, the plane rolled again 35 degrees to the right, then continued into the uncontrollable spin. Control could not be regained until the slat tore off and the gear was lowered.

This scenario was developed by one staff member through his comparison of an FDR tape from a Boeing simulation and the tape of the accident aircraft. He stated that they compared almost precisely.

There was more behind his analysis than was revealed publicly. Early in the investigation, Boeing had conducted a simulator study to evaluate the maneuver experienced by the accident aircraft. A number of scenarios were generated that might have produced similar maneuvers, and Boeing concluded that the aircraft rolled first to the right to a bank angle of about 60 degrees and then, due to pilot overcontrol, rolled 285 degrees to the left until it was inverted. Then, the aerodynamic effect of an extended No. 7 slat took hold, causing the aircraft to roll to the right again and into its spin.

ALPA investigators found that Boeing had to convert the simulator heading (true heading) information to magnetic (indicated heading) by determining the gimbal errors. This was done on a gyro tilt table in the laboratory. Boeing concluded that the above scenario "comes closest to matching the flight recorder data during the initial portion of the maneuver." ALPA disagreed, pointing out that the Boeing analysis was in error because of faulty gyro tilt table corrections. ALPA proved that there was no correlation between Flight

841's maneuvers and the Boeing simulation trace when the gimbal errors were correctly applied. In fact, ALPA's analysis showed that when the errors are correctly accounted for, a continuous right roll maneuver that the crew had described would produce the indicated heading trace of the accident aircraft *exactly!*

This finding no doubt caused Boeing and NTSB investigators to dig deeper to justify their position. ALPA sought an exact in-flight duplication of the events described by the crew and then a comparison of the FDR trace with that of the accident aircraft. However, although Boeing had stated the aircraft could be controlled with the No. 7 slat out at 39,000 feet, the company would not conduct such a flight test.

Still seeking to justify its original pilot-fault scenario, NTSB tried a new technique. The 841 FDR trace was magnified about 200 times in an attempt to show similarities to the Boeing gyro tilt table simulation. In the staff's judgment, they were similar. ALPA disagrees strongly because an FDR is incapable of producing a trace greater than six to eight cycles per second. Magnification of the traces reinforces FDR limitations on the accident 727.

Still another factor flawed the NTSB investigation. The autopilot used in the Boeing test was not the same as that on Gibson's 727. In fact, the Boeing autopilot was an experimental model that had not yet been certified. This was pointed out in detail in ALPA's recommendations for probable cause.

Speculation accepted

It was quickly evident in the staff's presentation that ALPA's petition had been completely ignored. The questions by the three board members centered on phrasing and interpretations of words like "inappropriate," "untimely," and "distraction" in regard to the captain's manipulation of the controls. The board accepted the speculative scenario as the staff had presented it; no mention was ever made of ALPA's findings or even of the Association offering an analysis.

Sitting in the rear of the hearing room, Captain Gibson and First Officer J. S. Kennedy could not believe what they were hearing. Gibson said, "I feel like I died in that accident and that I am looking down on this scene, unable to tell them that the aircraft did not roll twice as they are saying."

As the board completed its questioning of the staff, three statements of probable cause were submitted, and after lengthy discussion of the wording of each, one statement was approved. Driver and Bursley voted to accept the staff's report; McAdams, whose line of questioning had clearly shown he was skeptical of the staff's expression of the probable cause, voted against it (which meant that, of the five board members, a minority of two decided the fate of the crew). He reserved the right to submit his own probable cause statement later. The approved statement read:

"The safety board determines that the probable cause of this accident was the isolation of the No. 7 leading-edge slat in the fully or partially extended position after an extension of the No. 2, 3, 6, and 7 leading-edge slats and the subsequent retraction of No. 2, 3, and 6 slats; and the captain's untimely flight control inputs to counter the roll resulting from the slat asymmetry. Contributing to the cause was a preexisting misalignment of the No. 7 slat which, when combined with the cruise condition air loads, precluded retraction of that slat. After eliminating all probable individual or combined mechanical

"Gibson said, 'I feel like I died in that accident and that I am looking down on this scene, unable to tell them that the aircraft did not roll twice as they are saying.'"

failures or malfunctions which could lead to slat extension, the safety board determined that the extension of the slats was the result of the flight crew's manipulation of the flap/slat controls. Contributing to the captain's untimely use of the flight controls was distraction due probably to his efforts to rectify the source of the control problem."

After the vote was taken, all three members complimented the staff for their diligence and excellent analysis. McAdams, the dissenter, stated for the record that he "had problems" with the outcome because it meant that they had ignored much of the testimony of the crew. "We accept some things the captain said and reject others," he stated, and he felt it was "essential that we present the reasons why we are rejecting the testimony of the crew." He added that he wished that another deposition could have been taken for the crew to comment on the staff's analysis and that he would be interested in seeing any petition for reconsideration.

Member Bursley made a short statement to the effect that he felt some lessons had been learned from this investigation and that a public hearing should have been held.

A special hell

More than two years have passed since this accident occurred. Captain Gibson has since been checked out in the L-1011. His medical certificate had been withdrawn by FAA for unspecified reasons for several months, and he was denied access to his medical records to find out why. After persistent inquiry, his medical certificate was restored just as mysteriously as it had been withdrawn.

First Officer Scott Kennedy is still flying right seat in 727s. Second Officer Gary Banks has been furloughed because of low seniority.

The three men filed suits totaling $20 million in early April against the Boeing Company, FAA, and NSTB, claiming that "the circulation and publication of false, defamatory, inaccurate, irrelevant, and incomplete information about their professional conduct" has harmed their reputations, hurt them economically, and caused them "mental pain and suffering, anxiety, and other emotional and physical consequences." Suits also ask an injunction against any further action by NTSB until "it establishes fair and reasonable procedures which adequately safeguard plaintiffs' rights." The action against Boeing is based on defamation of character; the complaint against FAA and NTSB is for alleged violations of the Privacy Act.

Anyone accused of a crime he did not commit would understand the special hell these three crew members have been going through. There is no concrete, scientifically acceptable evidence against them, yet they have been adjudged guilty by one government agency whose basic task is to conduct thorough and impartial accident inves-

Although NTSB never questioned any of the passengers on Flight 841, as noted last month in Part I, one passenger felt compelled to bear witness when NTSB's accusations became public.

Mr. H. G. Bissinger
St. Paul Pioneer Press
St. Paul, Minn. 55101

June 11, 1981

Dear Mr. Bissinger,

After reading your article in yesterday's issue of your newspaper regarding the NTSB ruling placing blame on the flight crew which resulted in the dive of TWA Flight 841 on April 4, 1979, my husband and I felt I had to write this letter in response to this absurd, contradictory, and untrue ruling.

Why didn't someone interview the first class passengers? After a phone call from Mr. C. Hayden Leroy shortly after the flight, we heard nothing from any investigator.

The board made their ruling on the premise that Flight Engineer Gary Banks, after returning to the cockpit, punched a circut breaker back in. I can recall every second of that flight. I can hear the cabin bell ding that called our flight steward to the cockpit. I can see him carrying the dishes back to the galley, which was right behind me. No one came out of the cockpit. If Gary Banks told me that he did in fact return those dishes, I would tell him he was mistaken. We saw no member of the flight crew come out of that cockpit at any time during the flight.

We get the distinct impression that the NTSB wishes the plane had crashed. If that had happened it would have been ruled pilot error and the monkey would have been off their backs. I refuse to feel guilty that we survived so a few so-called professional flight investigators would have had an easier job.

The board's total lack of acceptance of sworn testimony from the crew is unjustifiable. What is ironic is their statement that if they had not ruled against the pilots it would have cast doubt on the airworthiness of the aircraft.

NTSB's James Danaher was quoted as saying Captain Gibson might be viewed as "something less than a hero." To whom? Him? Captain Gibson (pilot) and Kennedy (copilot) are much more than heroes to us, and I totally disregard any inane remarks to the contrary.

Sincerely yours,
Jeannine (Mrs. Robt.) Rakowsky
Passenger-Survivor
Seat 3-F, TWA Flight 841

tigations. The company that built the aircraft they flew that night is anxious to keep an accusing finger away from its product. FAA does not want to be blamed for oversight of a serious problem. And NTSB does not like to be accused of sloppy investigations.

On July 13, 1981, FAA quietly published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* that

BEST AVAILABLE COPY

verifies the credibility of ALPA's scenario. The NPRM proposes to adopt an Airworthiness Directive that would require repetitive inspection or removal of all Decoto leading-edge actuators on 727 aircraft. Although Gibson's aircraft had Ronson actuators, the parts are almost identical. "This action is necessary," the NPRM states, "because cracks have been discovered in these actuators in service. *Failure of an actuator could result in inadvertent extension of the corresponding leading-edge device* [italics added]."

Although NTSB considers the case of TWA Flight 841 closed, ALPA's pursuit of a fair representation of the facts continues. ALPA investigators are now preparing a petition for reconsideration to be submitted to NTSB as soon as possible. Further developments will be reported in *Air Line Pilot*. □

AFFIDAVIT INVOKING F R CIV. PR. 56 (f)

STATE OF NEVADA, ss:

LANDON DOWDEY, being first duly sworn according to law, deposes and says as follows:

1. He is counsel to plaintiffs in the above captioned cause.

2. Prior to the filing of defendant Boeing's motion for summary judgment, plaintiffs' counsel was informed by Boeing's counsel that a "motion to dismiss" would be filed "which raises legal issues unrelated to the discovery requested of my client" (Exhibit A to this affidavit).

3. On the basis of such representation, plaintiffs' counsel agreed to a stipulation, prepared by Boeing's counsel, suspending Boeing's responses to plaintiffs' then outstanding discovery re-

quests until 30 days after "disposition by the Court of Boeing's motion to dismiss plaintiff's complaint" which the court endorsed September 21, 1981 (Exhibits B-1 and B-2 to this affidavit).

4. When defendant Boeing later filed its motion to dismiss on October 14, 1981 it joined with it a motion for summary judgment supported by a number of affidavits (without, however, filing at that time any proposed findings of fact, conclusions of law and summary judgment as required by Local Rule 16 (f)(1)). Plaintiffs responded in their opposition (under "Statement of the Case, p. 4):

> The only facts properly before the court on defendants' several motions are those set forth in the complaint and the affidavits attached to defendant's motions. The affidavits, however, do not traverse any allegations of the complaint, but raise, instead, additional facts in support of certain affirmative legal defenses which, to the extent they need to be noticed, will be discussed hereafter

> in connection with the arguments concerning those defenses.

On page 8, plaintiffs pointed out:

> ... the complaint alleges a variety of assertions, published by a variety of defendant's agents which, fairly read, would imply publication in a variety of forms at a variety of places, at a variety of times. Defendant's motion, however, addresses itself to only one of the many publications alleged, namely, the "written report to defendant NTSB."
>
> Defendant Boeing's motions do not therefore address themselves to the merits of all the claims alleged, but only to a single publication. Thus, the motion to dismiss is, at best, a motion to strike; and the motion for summary judgment, a motion for partial summary judgement only.

Footnote 22, at p. 13 of plaintiffs' opposition, reiterates this statement in respect to the "borrowing statute" issue.

Thus, it is submitted, plaintiffs complied with Local Rule 16 (f) (2) notwithstanding defendant Boeing's failure to comply with subparagraph (1) thereof.

5. In its reply memorandum, pp. 4-6, Boeing asserts that by failing to file

counter affidavits:

(a) Plaintiffs are concluded on this motion by the assertion contained in the affidavit of Boeing's Manager of Air Safety Investigation, Mr. Hogue, that "he has questioned all other Boeing personnel involved in assisting the NTSB in this matter and that neither he nor any other Boeing personnel involved have communicated the contents of the report to anyone other than the NTSB or Boeing attorneys" (item II, pp. 4-5); and

(b) "A review of the extensive Boeing report and the technical analyses contained in it contradicts any suggestion that Boeing's conclusions were arrived at carelessly, let alone recklessly" (item III, p. 6).

6. The same day it filed this reply memorandum, defendant Boeing filed and served, for the first time, the proposed

findings of fact and conclusions of law and summary judgment required by Local Rule 16 (f) (1) to be filed "with each motion for summary judgment" (emphasis added).

Since Local Rule 16 does not provide for any written response after the filing of a "reply memorandum" under paragraph (d) thereof, plaintiff was effectively prevented from making any response to these assertions except as might be presented upon oral argument under paragraph (g) of Local Rule 16.

7. It would appear however:

(a) the affidavit of Mr. Hogue about his canvas of wrongdoing by Boeing personnel falls exactly into the category of "conclusory affidavits and affidavits that do not show personal knowledge of specific facts" condemned by the court in Long v. Bureau of Economic Analysis, 646

F.2d 1310 at 1321 (9th Cir. 1981), cited in defendant Boeing's reply memorandum; and

(b) the issue of abuse of qualified privilege (which Boeing describes -much too briefly- as whether the Boeing report was arrived at "carelessly" or "recklessly") is like any other issue of "intent and knowledge" upon which "a jury should be allowed to draw its own inferences" even where (unlike the present case) the facts are undisputed. Commodity Futures Trading Commission v. Savage, 611 F.2d 279 at 282-283 (9th Cir., 1979) also cited in Boeing's reply memorandum.

Furthermore, the issue of qualified privilege embraces, not only, Boeing's "knowledge of falsity or reckless disregard as to truth" (Restatement of Torts, Second, §600), but also whether Boeing acted for a purpose other than that for

which the privilege is given (Ibid, §603); and whether Boeing included unprivileged matter in addition to privileged matter with its publication (Ibid, §605A).

All of these things are set forth in the complaint where it is alleged that Boeing's assertions respecting the crew:

> (2) are false and based on theories unsupported by fact and discredited by tests; (3) were published with knowledge of their falsity or with reckless disregard for their truth, or negligently; (4) went beyond the scope of prescribed practice in NTSB and other accident investigations in that the stated conclusions were premature and amounted to a prejudgment before all the evidence was in; and (5) went beyond the purpose of the inquiry in that the conclusions were motivated by an attempt to side-track any meaningful investigation of the airworthiness of the Boeing 727, the most widely used commercial aircraft in service today.

8. In order, however, to satisfy -without possibility of misunderstanding- the letter of F R Civ. Pr. 56 (f) as outlined in British Airways Bd. v. Boeing

Co., 585 F.2d 946 at 955 (9th Cir., 1978), cited by Boeing in its reply memorandum, plaintiffs' counsel states:

(a) Plaintiffs have had no discovery in this case thus far.

(b) Plaintiffs have not insisted on discovery from defendants prior to a hearing on this motion because of the stipulation endorsed by the court September 21, 1981 suspending discovery until after determination of Boeing's motion to dismiss which plaintiffs agreed to upon the representation of Boeing's counsel that such motion would "raise legal issues unrelated to the discovery requested of my client" (Exhibits A, B-1 and B-2 to this affidavit).

(c) Plaintiffs are therefore unable at this time, without discovery, to present by affidavit or otherwise facts essential to justify their opposition to

defendants' motions for summary judgment concerning anything beyond the sufficiency of the complaint.

(d) More specifically, plaintiffs are unable at this time to develop by affidavit or otherwise

> (i) the time, place and circumstances of defamatory publications by Boeing's agents other than the "written report to the NTSB."
>
> (ii) circumstances showing abuse of any qualified privilege Boeing may claim beyond those reflected in the deposition of Mr. Kampshror, NTSB's investigator-in-charge, taken on January 13, 1982 in the personal injury litigation presently pending in the Minnesota courts (excerpted as Exhibit C to this affidavit).
>
> There Mr. Kampshror was interrogated with respect to that portion of the "Boeing Report" which contained Boeing's "conclusions" (blaming "a positive system command" -that is, flight crew action- for deploying and then retracting the leading edge slats, thus causing the six-mile spiral dive which was "not appropriately controlled by the flight crew" and minimizing the

crews's skill in saving the aircraft and passengers). He testified as follows (bottom of p. 183, Exhibit C):

> Q. The conclusions that were prepared on behalf of Boeing, were they requested by the National Transportation Board?
>
> A. No.

(iii) As shown by that same transcript, a number of NTSB records covering this case were not to be found at the time Mr. Kampshror's deposition was taken, possibly because they were in the process of being put on "microfish" (Exhibit C, pp. 186-188). Mr. Kampshror's deposition, therefore, had to be adjourned. For this and other reasons, a more extensive development of Boeing defamatory assertions to NTSB personnel and others cannot be developed at this time.

(iv) For the same reason, no reliable response can presently be made to defendant government agencies' claimed non location of references to the NTSB proceedings in any "system of records."

9. Plaintiffs' counsel was advised by telephone at 5:30 pm, Sunday February 21,

that yet another Boeing affidavit -one by a certain William B. Weston- was left at the office of co-counsel Thomas D. Beatty at 3:34 pm Friday, February 19, while Mr. Beatty was in Los Angeles. He learned of this affidavit on Sunday only a short time before informing your affiant. Counsel for plaintiffs have not yet examined this new affidavit.

10. For all the foregoing reasons, plaintiffs respectfully request the court not to try this case on affidavits, deny the pending motions for summary judgment and set the case down for trial on the merits at the earliest opportunity after completion of discovery.

/s/Landon Dowdey
LANDON DOWDEY

[EXECUTED, FILED AND VERIFIED FEBRUARY 22, 1982]

[A nearly identical affidavit, eliminating only the sentence in paragraph 9, "Counsel for plaintiff has not yet examined this affidavit," was reexecuted and refiled May 6, 1983, three days before the summary judgment hearing on May 9, 1983]

EXCERPTS FROM CIVIL DOCKET
CV-LV-81-157

4/31/81 (NR 1) COMPLAINT for Damages & Injunctive Relief w/Jry Demand. (SS). jl.

7/29/81 (NR 23) ANSWER of D Boeing Company. jl.

9/1/81 (NR 30) MOTION to dism or for S/J, obo D USA, w/P&A's, affs, exhibs, memo in suprt, prop FFCL & prop S/J. (m 8/24/81). (SS). jl.

9/16/81 (NR 33) SUPPLEMENT to complt for damages & injunct relief, obo Ps. (m). jl.

9/22/81 (NR 34) STIPULATION/ORDER: (HEC) ORD that responses to Ps 1st set of interrogs to D Boeing, & to Ps 1st req of D Boeing to produce shall be due 30 days following dispo of Boeing's mtn dism to be fld not later than 9/28/81. Cps dist. (SS). jl.

10/19/81 (NR 38) MOTION for S/J, obo D Boeing, w/P&A's & exhibs. (NOTE: does not cmply w/LR 16(f), cnsl notified). (SS). jl.
(NOTE: mtn under sep cover due to bulkiness).

11/17/81 (NR 39) OPPOSITION to mtns of sev Ds to dism & for s/j (#30 & 38) obo Ps w/apps & prop ord (m-11/16/81). (SS) pl.

12/7/81 (NR 41) REPLY P&A's in supp of D

Boeing's mtn for s/j (#38) obo D Boeing w/prop FFCL & prop s/j (m). pl.

12/14/81 (NR 45) REPLY memo in support of D USA's mtn to dism or for S/J obo D USA w/aff. (m-12/11/81.)

2/19/82 (NR 51) AFFIDAVIT of William B. Weston, in support of #38, fld obo D. Boeing. (p&m). lm.

2/22/82 (NR 52) MINUTE ORDER: (HEC) ORD that crt disqualifies itself pur Title 28 Sec 455 of USC & actn assigned to Hon Roger D. Foley for all fur proc. Case number now is CV-LV-81-157-RDF. FUR ORD that hrg on mtn to dism or for S/J fld obo Fed Ds on 9/1/81 (#30) & mtn for S/J fld obo D Boeing 10/19/81 (#38) both sched for oral argu 2/22/82 are vac & not rest at this time. Cps dist. (SS) pl.

2/23/82 (NR 54) AFFIDAVIT invoking FRCP 56(f) obo P to be sub @ oral argu on pending mtns for s/j w/exhibs. pl.

4/2/82 (NR 57) AFFIDAVIT of Leslie D. Kampschror re depo (p/m). pl.

4/22/82 (NR 58) MINUTE ORDER: (RDF) ORD that stip of cnsl dtd 4/20/82 to assign case to Mag will be filed. The same is disapproved. Cps dist. pl.

7/7/82 (NR 63) MINUTE ORDER: (RDF) ORD tht the matter of oral argu on pending mtns pres sched 7/12/82 is vac. Case contd to cal of 10/18/82 @ 2 PM in crtrm #1 for oral argu on 1) mtn to dism or for s/j fld 9/1/82 obo Fed Ds & 2) mtn for

s/j obo Boeing fld 10/19/81. A total of 1 hr/20 mins allowd for hrg w/Fed Ds (jointly) allowd 20 mins, the D Boeing allowd 20 mins & Ps (jointly) 20 mins as to ea mtn. Cps dist. pl.

9/9/82 (NR 64) MINUTE ORDER: (RDF) ORD that 10/18/82 hrng in this matter vacated. cps dist. (SS) hrl.

10/14/82 (NR 65) MINUTE ORDER: (RDF) ORD case on cal of 11/15/82, 2pm for oral arg on #30 & #38. A total of 1-1/2 hrs will be allwd for hrng. cps dist. hrl.

11/5/82 (NR 66) MINUTE ORDER: (RDF) ORD Hrng of 11/15/82 re #30 vac & to be re-sched at later date. cps dist. (SS) hrl.

3/24/83 (NR 67) MINUTE ORDER (RDF) ORD case on cal 5/9/83, 9:30 am, oral argumt on #30 and 38, etc. Cps dist. hdj.

5/13/83 (NR 69) FINDINGS/FACT/CONCLUSION/ LAW (RDF) re Boeing Mtn for S/J #38 (See doc for spcs) Cps dist. efm.

(NR 70) SUMMARY JUDGMENT (RDF) ORD. Cmplt against The Boeing Co. is dism w/prejudice, w/costs to The Boeing Co. as taxed by the Clerk. Cps dist. efm. EOD 5/13/83 (ss).

(NR 71) FINDINGS/FACT/CONCLUSIONS/LAW (RDF) re USA Mtn #30 (See doc for spcfs) Cps dist. efm.

(NR 72) SUMMARY JUDGMENT (RDF) ORD. judgmt ent. in favor of the National Safety

Transp. Board & its Chairman, James V. King & Fed. Aviation Admins. & its Administrator, J. Lynn Helms & against Ps Gibson, Banks & Kennedy. EOD 5/13/83. Cps dist. efm. (ss).

5/24/83 (NR 73) NOTICE/APPEAL obo Gibson, Kennedy & Banks, P's. Dist Crt flg gee pd. Cps to C/a w/docket sheet; cnsl. (SS) jr.

SUBCHAPTER VII—AIRCRAFT ACCIDENT INVESTIGATION

§ 1441. Accidents involving civil aircraft

General duties of National Transportation Safety Board

(a) It shall be the duty of the National Transportation Safety Board to—

(1) Make rules and regulations governing notification and report of accidents involving civil aircraft;

(2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such recommendations to the Administrator as, in its opinion, will tend to prevent similar accidents in the future;

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and

(5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents.

Employment of temporary personnel

(b) The National Transportation Safety Board may, without regard to the civil-service laws, engage, for temporary service in the investigation of any accident involving aircraft, persons other than officers or employees of the United States and may fix their compensation without regard to chapter 51 and subchapter III of chapter 53 of Title 5; and may, with consent of the head of the executive department or independent establishment under whose jurisdiction the officer or employee is serving, secure for such service any officer or employee of the United States.

Conduct of investigations; examinations and tests; autopsies and protection of religious beliefs

(c) In conducting any hearing or investigation, any member of the National Transportation Safety Board or any officer or employee of the National Transportation Safety Board or any person engaged or secured under subsection (b) of this section shall have the same powers as the National Transportation Safety Board has with respect to hearings or investigations conducted by it. In carrying out its duties under this subchapter, the National Transportation Safety Board is

authorized to examine and test to the extent necessary any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce. In the case of any fatal accident, the National Transportation Safety Board is authorized to examine the remains of any deceased person aboard the aircraft at the time of the accident, who dies as a result of the accident, and to conduct autopsies or such other tests thereof as may be necessary to the investigation of the accident: *Provided*, That to the extent consistent with the needs of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed.

Preservation of aircraft, engines, propellers, appliances or property aboard aircraft involved in accidents

(d) Any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce, shall be preserved in accordance with, and shall not be moved except in accordance with, regulations prescribed by the National Transportation Safety Board.

Use of records and reports as evidence

(e) No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Investigations by Administrator; report

(f) Upon the request of the National Transportation Safety Board, the Administrator is authorized to make investigations with regard to aircraft accidents and to report to the National Transportation Safety Board the facts, conditions, and circumstances thereof, and the National Transportation Safety Board is authorized to utilize such reports in making its determinations of probable cause under this subchapter.

Participation by Administrator in investigations

(g) In order to assure the proper discharge by the Administrator of his duties and responsibilities, the National Transportation Safety Board shall provide for the appropriate participation of the Administrator and his representatives in any investigations conducted by the National Transportation Safety Board under this subchapter: *Provided*, That the Administrator or his representatives shall not participate in the determination of probable cause by the National Transportation Safety Board under this subchapter.

Pub.L. 85–726, Title VII, § 701, Aug. 23, 1958, 72 Stat. 781; Pub.L. 87–810, §§ 1, 2, Oct. 15, 1962, 76 Stat. 921.

CHAPTER 28—NATIONAL TRANSPORTATION SAFETY BOARD

Sec.

1901. Congressional findings.
1902. National Transportation Safety Board.
(a) Establishment.
(b) Organization.
(c) General.
1903. General provisions.
(a) Duties of Board.
(b) Powers of Board.
(c) Use of reports as evidence.
(d) Judicial review.
1904. Annual report.
1905. Public access to information.
(a) General.
(b) Exception.
1906. Response to Board recommendations.
1907. Authorization of appropriations.

§ 1901. Congressional findings

The Congress finds and declares:

(1) The National Transportation Safety Board was established by statute in 1966 (Public Law 89–670; 80 Stat. 935) as an independent Government Agency, located within the Department of Transportation, to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations.

(2) Proper conduct of the responsibilities assigned to this Board requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government; demands continual review, appraisal, and assessment of the operating practices and regulations of all such agencies; and calls for the making of conclusions and recommendations that may be critical of or adverse to any such agency or its officials. No Federal agency can properly perform such functions unless it is totally separate and independent from any other department, bureau, commission, or agency of the United States.

Pub.L. 93–633, Title III, § 302, Jan. 3, 1975, 88 Stat. 2166.

EDITOR'S NOTE

PAGES 84 thru END WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Historical Note

References in Text. National Transportation Safety Board was established by section 5 of Pub.L. 89-670, formerly classified to section 1654 of this title, and referred to in subd.(1) as being established by statute in 1966.

Short Title. Section 301 of Pub.L. 93-633 provided that: "This title [which enacted this chapter and amended section 1653(c), (d) and repealed section 1654 of this title] may be cited as the 'Independent Safety Board Act of 1974'."

Legislative History. For legislative history and purpose of Pub.L. 93-633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

Code of Federal Regulations

Information, public access to, see 14 CFR 401.1 et seq.
Organization, functions, powers and duties, etc., see 14 CFR 400.1 et seq.

§ 1902. National Transportation Safety Board

Establishment

(a) The National Transportation Safety Board (hereafter in this chapter referred to as the "Board"), previously established within the Department of Transportation, shall be an independent agency of the United States, in accordance with this section, on and after April 1, 1975.

Organization

(b)(1) The Board shall consist of five members, including a Chairman. Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. No more than three members of the Board shall be of the same political party. At any given time, no less than two members of the Board shall be individuals who have been appointed in the field of accident reconstruction, safety engineering, or transportation safety.

(2) The terms of office of members of the Board shall be 5 years, except as otherwise provided in this paragraph. Any individual appointed to fill a vacancy occurring on the Board prior to the expiration of the term of office for which his predecessor was appointed shall be appointed for the remainder of that term. Upon the expiration of his term of office, a member shall continue to serve until his successor is appointed and shall have qualified. Individuals serving as members of the National Transportation Safety Board on January 3, 1975, shall continue to serve as members of the Board until the expiration of their then current term of office. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(3) On or before January 1, 1976 (and thereafter as required), the President shall—

(A) designate, by and with the advice and consent of the Senate, an individual to serve as the Chairman of the Board (hereafter in this chapter referred to as the "Chairman"); and

(B) an individual to serve as Vice Chairman.

The Chairman and Vice Chairman each shall serve for a term of 2 years. The Chairman shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board with respect to the appointment and supervision of personnel employed by the Board; the distribution of business among such personnel and among any administrative units of the Board; and the use and expenditure of funds. The Vice Chairman shall act as Chairman in the event of the absence or incapacity of the Chairman or in case of a vacancy in the office of Chairman. The Chairman or Acting Chairman shall be governed by the general policies established by the Board, including any decisions, findings, determinations, rules, regulations, and formal resolutions.

(4) Three members of the Board shall constitute a quorum for the transaction of any function of the Board.

(5) The Board shall establish and maintain distinct and appropriately staffed bureaus, divisions, or offices to investigate and report on accidents involving each of the following modes of transportation: (A) aviation; (B) highway and motor vehicle; (c) railroad and tracked vehicle; and (D) pipeline. The Board shall, in addition, establish and maintain any other such office as is needed, including an office to investigate and report on the safe transportation of hazardous materials.

General

(c)(1) The General Services Administration shall furnish the Board with such offices, equipment, supplies, and services as it is authorized to furnish to any other agency or instrumentality of the United States.

(2) The Board shall have a seal which shall be judicially recognized.

(3) Subject to the civil service and classification laws, the Board is authorized to select, appoint, employ, and fix the compensation of such officers and employees, including investigators, attorneys, and administrative law judges, as shall be necessary to carry out its powers and duties under this chapter.

Pub.L. 93–633, Title III, § 303, Jan. 3, 1975, 88 Stat. 2167.

Historical Note

References in Text. "This chapter", referred to in subsecs. (a), (b)(3)(A), and (c)(3), read "this title" in the original, meaning Title III of Pub.L. 93-633, the

Independent Safety Board Act of 1974. For classification of Title III of Pub.L. 93-633 in the Code, see Short Title note under section 1901 of this title.

Civil service and classification laws, referred to in subsec. (c)(3), are classified to Title 5, Government Organization and Employees. See, particularly, sections 3301 et seq., 5101 et seq., and 5331 et seq.

Legislative History. For legislative history and purpose of Pub.L. 93-633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

§ 1903. General provisions

Duties of Board

(a) The Board shall—

(1) investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any—

(A) aircraft accident which is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 1655(d) of this title pursuant to title VII of the Federal Aviation Act of 1958, as amended;

(B) highway accident, including any railroad grade crossing accident, that it selects in cooperation with the States;

(C) railroad accident in which there is a fatality, substantial property damage, or which involves a passenger train;

(D) pipeline accident in which there is a fatality or substantial property damage;

(E) major marine casualty, except one involving only public vessels, occurring on the navigable waters or territorial seas of the United States, or involving a vessel of the United States, in accordance with regulations to be prescribed jointly by the Board and the Secretary of the department in which the Coast Guard is operating. Nothing in this subparagraph shall be construed to eliminate or diminish any responsibility under any other Federal statute of the Secretary of the department in which the Coast Guard is operating: *Provided*, That any marine accident involving a public vessel and any other vessel shall be investigated and the facts, conditions, and circumstances, and the cause or probable cause determined and made available to the public by either the Board or the Secretary of the Department in which the Coast Guard is operating; and

(F) other accident which occurs in connection with the transportation of people or property which, in the judgment

of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy of this chapter.

The Board may request the Secretary of Transportation (hereafter in this chapter referred to as the "Secretary") to make investigations with regard to such accidents and to report to the Board the facts, conditions, and circumstances thereof (except in accidents where misfeasance or nonfeasance by the Federal Government is alleged), and the Secretary or his designees are authorized to make such investigations. Thereafter, the Board, utilizing such reports, shall make its determination of cause or probable cause under this paragraph;

(2) report in writing on the facts, conditions, and circumstances of each accident investigated pursuant to paragraph (1) of this subsection and cause such reports to be made available to the public at reasonable cost and to cause notice of the issuance and availability of such reports to be published in the Federal Register;

(3) issue periodic reports to the Congress, Federal, State, and local agencies concerned with transportation safety, and other interested persons recommending and advocating meaningful responses to reduce the likelihood of recurrence of transportation accidents similar to those investigated by the Board and proposing corrective steps to make the transportation of persons as safe and free from risk of injury as is possible, including steps to minimize human injuries from transportation accidents;

(4) initiate and conduct special studies and special investigations on matters pertaining to safety in transportation including human injury avoidance;

(5) assess and reassess techniques and methods of accident investigation and prepare and publish from time to time recommended procedures for accident investigations;

(6) establish by regulation requirements binding on persons reporting accidents subject to the Board's investigatory jurisdiction under this subsection;

(7) evaluate, assess the effectiveness, and publish the findings of the Board with respect to the transportation safety consciousness and efficacy in preventing accidents of other Government agencies;

(8) evaluate the adequacy of safeguards and procedures concerning the transportation of hazardous materials and the performance of other Government agencies charged with assuring the safe transportation of such materials; and

(9) review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the Secretary of Transportation under sections 1422, 1429, or 1431(c) of this title; and (B) the decisions of the Commandant of the Coast Guard, on appeals from the orders of any administrative law judge revoking, suspending, or denying a license, certificate, document, or register in proceedings under section 239 of Title 46; sections 239a and 239b of Title 46; or section 216b of Title 46.

Powers of Board

(b)(1) The Board, or upon the authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Chairman, may, for the purpose of carrying out this chapter, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise the attendance and testimony of such witnesses and the production of such evidence as the Board or such officer or employee deems advisable. Subpoenas shall be issued under the signature of the Chairman, or his delegate, and may be served by any person designated by the Chairman. Witnesses summoned to appear before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Such attendance of witnesses and production of evidence may be required from any place in the United States to any designated place of such hearing in the United States.

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection shall be commenced and completed with reasonable promptness and the results of such inspection made available.

(3) In case of contumacy or refusal to obey a subpoena, an order, or an inspection notice of the Board, or of any duly designated employee thereof, by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon the request of the Board, have jurisdiction to issue to such person an order requiring such person to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

sary or appropriate to maintain effective liaison with other Federal agencies, and with State and local government agencies, and with independent standard-setting bodies carrying out programs and activities related to transportation safety.

(9) The Board, or an employee of the Board duly designated by the Chairman, may conduct an inquiry to secure data with respect to any matter pertinent to transportation safety, upon publication of notice of such inquiry in the Federal Register; and may require, by special or general orders, Federal, State, and local government agencies and persons engaged in the transportation of people or property in commerce to submit written reports and answers to such requests and questions as are propounded with respect to any matter pertinent to any function of the Board. Such reports and answers shall be submitted to the Board or to such employee within such reasonable period of time and in such form as the Board may determine. Copies thereof shall be made available for inspection by the public.

(10) Establish such rules and regulations as may be necessary to the exercise of its functions.

Use of reports as evidence

(c) No part of any report of the Board, relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Judicial review

(d) Any order, affirmative or negative, issued by the Board under this chapter shall be subject to review by the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. Such review shall be conducted in accordance with the provisions of chapter 7 of Title 5.

Pub.L. 93–633, Title III, § 304, Jan. 3, 1975, 88 Stat. 2168.

Historical Note

References in Text. Title VII of Federal Aviation Act of 1958, as amended, referred to in subsec. (a)(1)(A), is classified to section 1441 et seq. of this title.

"This chapter", referred to in subsecs. (a)(1)(F), sentence following (a)(1)(F), (b)(1), (4), and (d), read "this title" in the original, meaning Title III of Pub.L. 93-633, the Independent Safety Board Act of 1974. For classification of Title III of Pub.L. 93-633 in the Code, see Short Title note under section 1901 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

West's Federal Forms

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.

Code of Federal Regulations

Appeals from decisions of Commandant, United States Coast Guard, rules of procedure, see 14 CFR 425.1 et seq.

Notes of Decisions

1. *Jurisdiction*

Board does not have jurisdiction over challenges to Federal Aviation Administration regulations of general application even though such regulations may have substantial effect on individuals. Watson v. National Transp. Safety Bd., C.A.9, 1975, 513 F.2d 1081.

§ 1904. Annual report

The Board shall report to the Congress on July 1 of each year. Such report shall include, but need not be limited to—

(1) a statistical and analytical summary of the transportation accident investigations conducted and reviewed by the Board during the preceding calendar year;

(2) a survey and summary, in such detail as the Board deems advisable, of the recommendations made by the Board to reduce the likelihood of recurrence of such accidents together with the observed response to each such recommendation;

(3) an appraisal in detail of the accident investigation and accident prevention activities of other government agencies charged by Federal or State law with responsibility in this field; and

(4) a biennial appraisal and evaluation and review, and recommendations for legislative and administrative action and change, with respect to transportation safety.

Pub.L. 93–633, Title III, § 305, Jan. 3, 1975, 88 Stat. 2171.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-633 see 1974 U.S.Code Cong. and Adm.News, p. 7669.

§ 1905. Public access to information

General

(a) Copies of any communication, document, investigation, or other report, or information received or sent by the Board, or any member or employee of the Board, shall be made available to the public upon identifiable request, and at reasonable cost, unless such information may not be publicly released pursuant to subsection (b) of this section. Nothing contained in this section shall be deemed to require the

release of any information described by subsection (b) of section 552 of Title 5, or which is otherwise protected by law from disclosure to the public.

Exception

(b) The Board shall not disclose information obtained under this chapter which concerns or relates to a trade secret referred to in section 1905 of Title 18, except that such information may be disclosed in a manner designed to preserve confidentiality—

(1) upon request, to other Federal Government departments and agencies for official use;

(2) upon request, to any committee of Congress having jurisdiction over the subject matter to which the information relates;

(3) in any judicial proceeding under a court order formulated to preserve the confidentiality of such information without impairing the proceedings; and

(4) to the public in order to protect health and safety, after notice to any interested person to whom the information pertains and an opportunity for such person to comment in writing, or orally in closed session, on such proposed disclosure (if the delay resulting from such notice and opportunity for comment would not be detrimental to health and safety).

Pub.L. 93-633, Title III, § 306, Jan. 3, 1975, 88 Stat. 2172.

Historical Note

References in Text. "This chapter", referred to in subsec. (b), read "this title" is the original, meaning Title III of Pub.L. 93-633, the Independent Safety Board Act of 1974. For classification of Title III of Pub.L. 93-633 in the Code, see Short Title note under section 1901 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

§ 1906. Response to Board recommendations

Whenever the Board submits a recommendation regarding transportation safety to the Secretary, he shall respond to each such recommendation formally and in writing not later than 90 days after receipt thereof. The response to the Board by the Secretary shall indicate his intention to—

(1) initiate and conduct procedures for adopting such recommendation in full, pursuant to a proposed timetable, a copy of which shall be included;

(2) initiate and conduct procedures for adopting such recommendation in part, pursuant to a proposed timetable, a copy of

which shall be included. Such response shall set forth in detail the reasons for the refusal to proceed as to the remainder of such recommendation; or

(3) refuse to initiate or conduct procedures for adopting such recommendation. Such response shall set forth in detail the reasons for such refusal.

The Board shall cause notice of the issuance of each such recommendation and of each receipt of a response thereto to be published in the Federal Register, and shall make copies thereof available to the public at reasonable cost.

Pub.L. 93–633, Title III, § 307, Jan. 3, 1975, 88 Stat. 2172.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

§ 1907. Authorization of appropriations

There are authorized to be appropriated for the purposes of this Act not to exceed $12,000,000 for the fiscal year ending June 30, 1975; and $12,000,000 for the fiscal year ending June 30, 1976, such sums to remain available until expended.

Pub.L. 93–633, Title III, § 309, Jan. 3, 1975, 88 Stat. 2173.

Historical Note

References in Text. "This Act", referred to in text, means Pub.L. 93–633, the Transportation Safety Act of 1974, which enacted this chapter. For complete classification of Pub.L. 93–633 in the Code, see Short Title note under section 1901 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93–633, see 1974 U.S.Code Cong. and Adm.News, p. 7669.

§ 552a. Records maintained on individuals

(a) Definitions.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of Certain Disclosures.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solici-

tation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to

any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) **Civil remedies.**—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend

the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing

in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) **Rights of legal guardians.**—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) **Criminal penalties.**—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) **General exemptions.**—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual crimi-

nal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal

civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records.—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the

Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) **Government contractors.**—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) **Mailing lists.**—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) **Report on new systems.**—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) **Annual report.**—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) **Effect of other laws.**—No agency shall rely on any exemption

contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Added Pub.L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub.L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057.

DOT/FAA 804.

System name: General Aviation Aircraft Accident System. DOT/FAA.

System location: Department of Transportation (DOT),
Federal Aviation Administration (FAA),
Aeronautical Center,
Flight Standards Technical Division,
Safety Data Branch,
Oklahoma City, OK 73125.
Working copies are maintained in the region in which the accident occurred.
(See the FAA National Field Directory, 1000.23F, for locations).

Categories of individuals covered by the system: Persons involved in aircraft accidents, pilots, passengers, persons on the ground, and witnesses.

Categories of records in the system: Reports of accidents investigation, preliminary notices of accident, injury reports, engineering analysis, witness statements, investigators analysis, pictures of accident scene.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: To identify and monitor airman involved in accidents. Analyze facts surrounding accidents to determine whether or not FAA regulations have been violated.

To supply data to the National Transportation Safety Board (NTSB) as required by the delegated authority for accident investigation from the Board.
As a data source for management information, for the production of summary descriptive statistics and analytical studies in support of agency functions.
Used in the development of professional papers that are distributed to various aviation organizations and the general public as required.
To provide data for the Automated Comprehensive Airman Information System (CAIS).
See Prefatory Statement of General Routine Uses.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage: Records are maintained on magnetic tapes, in file folders, and magnetic disk.

Retrievability: Data is retrieved by name, date of birth and sex, social security numbers, airman numbers, and accident number.

Safeguards: Magnetic disk and magnetic tape.

Data can only be retrieved by computer operators through batch process methods.
File folders are maintained in a secured work area.
Files not in use are kept in locked cabinets accessible to persons with a need to know.

Retention and disposal: Raw files are destroyed after 3 years by shredding the ADP documents.

Magnetic tapes are updated monthly, records retained up to 10 years, magnetic disk updated continuously.

System manager(s) and address: Chief, Safety Data Branch,
Flight Standards Technical Division,
Aeronautical Center,
Oklahoma City, OK 73125.

Notification procedure: Individuals wishing to know if their

records appear in this system of records may inquire in person or in writing to the System Manager.

Record access procedures: Individuals who desire access to the information about themselves in this system of records should contact or address their inquiries to the System Manager.

Contesting record procedures: Individuals who desire to contest information about themselves contained in this system of records should contact or address their inquiries to the Administrator or his delegate at the following address:

Department of Transportation,
Federal Aviation Administration,
Office of the Administrator,
800 Independence Avenue, SW,
Washington, DC 20591.

Record source categories: Data is collected from individuals, manufacturers of aircraft, maintenance inspectors, accident investigators, witnesses to accident, and involved passengers.